DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-1438
Title: Harvey Leroy Sossamon, III, Petitioner
v.
Texas, et al.
Docketed: May 21, 2009
Lower Ct.: United States Court of Appeals for the Fifth Circuit
Case Nos.: (07-50632)
Decision Date: February 17, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
May 18 2009	Petition for a writ of certiorari filed. (Response due June 22, 2009)
Jun 11 2009	Order extending time to file response to petition to and including July 22, 2009.
Jun 22 2009	Brief amicus curiae of National Association of Evangelicals filed.
Jun 22 2009	Brief amicus curiae of Rutherford Institute filed.
Jul 22 2009	Brief of respondents Texas, et al. in opposition filed.
Aug 4 2009	Reply brief of petitioner Harvey Leroy Sossamon, III filed.
Sep 18 2009	Letter received from counsel for petitioner.
Oct 14 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Mar 18 2010	Brief amicus curiae of United States filed.
Mar 31 2010	DISTRIBUTED for Conference of April 16, 2010.
Mar 31 2010	Supplemental brief of petitioner Harvey Leroy Sossamon, III filed. (Distributed)
Apr 1 2010	Supplemental brief of respondents Texas, et al. filed. (Distributed)
Apr 14 2010	Letter of April 12, 2010, from counsel for petitioner received.
May 4 2010	DISTRIBUTED for Conference of May 20, 2010.
May 24 2010	Petition GRANTED limited to the following Question: "Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc et seq. (2000 ed.)."
Jun 4 2010	Record received from U.S.C.A. for Fifth Circuit. (1 Envelope)
Jun 10 2010	Motion for leave to proceed further herein in forma pauperis filed by petitioner Harvey Leroy Sossamon, III. (CL Page 163)
Jun 15 2010	Record received from the U.S.D.C. for the Western District of Texas. (1 box)
Jun 18 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 3, 2010.
Jun 18 2010	The time within which to file respondents' brief on the merits is extended to and including September 27, 2010.
Jun 22 2010	Motion to appoint counsel filed by petitioner Harvey Leroy Sossamon, III.
Jun 23 2010	Motion DISTRIBUTED for Conference of September 27, 2010.

Jun 28 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.
Jul 19 2010	Motion to dispense with printing the joint appendix filed by petitioner Harvey Leroy Sossamon, III.
Jul 25 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 3 2010	Brief of petitioner Harvey Leroy Sossamon, III filed.
Aug 6 2010	Brief amici curiae of Christian Legal Society and Prison Fellowship filed.
Aug 10 2010	Brief amicus curiae of the United States filed.
Aug 10 2010	Brief amicus curiae of The Rutherford Institute filed.
Aug 10 2010	Brief amicus curiae of National Association of Evangelicals filed.
Aug 10 2010	Brief amicus curiae of Becket Fund for Religious Liberty filed.
Aug 10 2010	Brief amicus curiae of Charles E. Sisney filed.
Aug 10 2010	Brief amici curiae of American Civil Liberties Union, et al. filed.
Aug 20 2010	CIRCULATED.
Aug 24 2010	SET FOR ARGUMENT ON Tuesday, November 2, 2010.
Sep 3 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 20 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 27 2010	Brief of respondents Texas, et al. filed. (Distributed)
Oct 4 2010	Motion for leave to proceed further herein in forma pauperis DENIED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 4 2010	Motion to appoint counsel filed by petitioner DENIED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 4 2010	Brief amici curiae of Florida, et al. filed. (Distributed)
Oct 18 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 21 2010	Reply of petitioner Harvey Leroy Sossamon, III filed. (Distributed)
Nov 2 2010	Argued. For petitioner: Kevin K. Russell, Bethesda, Md.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: James C. Ho, Solicitor General, Austin, Tex.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 08-1438 MAY 18 2009

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IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. The statute defines "government" to include state and local governmental entities and any "official of [such] an entity." *Id.* § 2000cc-5(4) (A). The Fifth Circuit held, in conflict with the decisions of other courts, that the Constitution prohibits Congress from authorizing damages claims against states, or against state officials in their individual or personal capacities, for violations of the statute. The question presented is:

Whether states and state officials may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act?

PARTIES TO THE PROCEEDINGS

Petitioner is Harvey Leroy Sossamon, III, an inmate in the Robertson Unit of the Texas Department of Criminal Justice.

Respondents are the State of Texas; Christina Melton Crain, Chair, Texas Criminal Justice Board; Cathy Clement, Assistant Director, Texas Department of Criminal Justice, Correctional Institution Division Region VI; Brad Livingston, Executive Director, Texas Department of Criminal Justice; Doug Dretke, Executive Director, Correctional Institutional Division; Reverend R.G. Murphy, Texas Department of Criminal Justice, Correctional Institutional Division Region VI Chaplaincy Regional Program Admin.; Senior Warden Robert Eason, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division; Assistant Warden Stacy L. Jackson, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division; Chaplain Paul J. Klien, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harvey Leroy Sossamon, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 560 F.3d 316 (5th Cir. 2009). The district court's opinion (Pet. App. 36a-57a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2009. Pet. App. 35a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Spending Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 1, provides, in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .

II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides, in relevant part:

> **Section 2000cc-1. Protection of religious exercise of institutionalized persons**
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person —
>
> (1) is in furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling interest.
>
> (b) Scope of application
>
> This section applies in any case in which —

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Section 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

* * * * *

Section 2000cc-5. Definitions

In this chapter:

* * * * *

(4) Government

The term "government" —

(A) means —

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law . . . .

STATEMENT OF THE CASE

Petitioner, a prison inmate, brought this suit against the State of Texas and state prison officials in their individual and official capacities, seeking monetary damages for violations of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000). In acknowledged conflict with the decisions of other federal courts, the Fifth Circuit held that although RLUIPA's statutory text supported damages claims against states and state officials, the Eleventh Amendment and Spending Clause foreclosed such relief.

1. RLUIPA is a civil rights law designed to protect against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion. Section 3 of the Act applies to any state prison that "receives federal financial assistance." *id.* § 2000cc-1(b), and directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," *id.* § 2000cc-1(a), unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest, *id.* §§ 2000cc-1(a)(1) and (2). "[R]eligious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence collected during three years of hearings that persons institutionalized in state facilities face "'frivolous or

arbitrary' barriers" to their religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citation omitted); *see also* H.R. Rep. No. 106-219, at 9-10 (1999) (describing prison's taping of confession between priest and penitent); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (*Joint Stmn.*) (summarizing findings); *Protecting Religious Liberty After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1998) (discussing discriminatory accommodations).

Based on its investigation, Congress found that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Stmn.*, 146 Cong. Rec. at S7775. Concerned that federal funding not contribute to such frivolous, unreasoned, or discriminatory impositions on religious exercise, Congress invoked its Spending Clause authority, U.S. CONST., art. I, § 8, cl. 1, to require the application of RLUIPA's heightened statutory protection for religious exercise whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).

To ensure effective enforcement of the Act, Congress created an express private right of action, providing that a "person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

42 U.S.C. § 2000cc-2(a). The term "government," in turn, is broadly defined to include:

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law.

Id. § 2000cc-5.

2. Petitioner is an inmate at the Robertson Unit of the Texas Department of Criminal Justice Correction Institutions Division. In 2006, he filed suit in the U.S. District Court for the Western District of Texas against the State of Texas and various prison officials in their individual and official capacities alleging, among other things, violations of RLUIPA. Pet. App. 4a-5a.[1] More specifically, petitioner challenged respondents' policy forbidding prisoners who were in confinement for disciplinary infractions from leaving their cells to attend religious services, even though such inmates were allowed to leave their cells "to attend work, to eat, to shower, to have medical lay-ins, to attend educational classes, to

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[1] Petitioner also brought claims for violations of the Texas Religious Freedom Restoration Act and under 42 U.S.C. § 1983 for violations of his First, Eighth, and Fourteenth Amendment rights. Pet. App. 4a-5a. The district court dismissed those claims, Pet. App. 56a-57a, and they are not at issue here.

use the law library, and to participate in other secular activities." Pet. App. 3a.

In addition, even when not on cell restriction, petitioner and other inmates were prohibited from using the prison chapel for religious services under any circumstances. Pet. App. 5a-6a. Instead, petitioner and other inmates were relegated to attending worship services in a "multi-purpose room," Pet. App. 39a, that lacked "Christian symbols or furnishings, such as an altar and cross, which have special significance and meaning to Christians." Pet. App. 2a-3a (internal quotation marks omitted). Petitioner was thus prevented from engaging in basic aspects of Christian worship, such as kneeling at an altar or receiving Holy Communion in view of a cross. Pet. App. 3a. Moreover, during Sunday assembly and Bible study, loud noise from the nearby prison yard disrupted services in the multi-purpose room. Pet. App. 3a.

While respondents alleged that the prohibition was for security reasons, the prison nonetheless allowed inmates to use the chapel for non-religious purposes, including "weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates." Pet. App. 30a. Prisoners were also allowed to use the chaplain's office at night to make phone calls, but nonetheless could not enter the area to pray or worship. Pet. App. 8a.

Petitioner's complaint sought declaratory and injunctive relief, as well as compensatory and punitive damages. Pet. App. 5a.

The District Court granted respondents' motion for summary judgment, holding that Texas's sovereign immunity barred damages claims against the state or its officers in their official capacities, and that, in any event, petitioner's RLUIPA claims failed on the merits. Pet. App. 57a.

4. The Fifth Circuit affirmed in part and reversed in part. Pet. App. 35a.

a. As an initial matter, the court dismissed as moot petitioner's claims for injunctive relief relating to the cell-restriction policy based on the State's representation that it had abandoned the policy statewide while the appeal was pending. Pet. App. 12a.

With respect to petitioner's chapel-access claims, the Fifth Circuit reversed the grant of summary judgment. The court held that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief." Pet. App. 14a. The court next determined that there were genuine issues of material fact concerning whether petitioner's rights under RLUIPA had been violated. Pet. App. 32a. The court held that "there can be no serious dispute" that petitioner's desire for access to the chapel was motivated by genuine religious belief, Pet. App. 26a, and that a jury could reasonably find that barring petitioner from the chapel imposed a "substantial burden" on his religious exercise. Pet. App. 30a. The court further ruled that the prison's willingness to let the chapel be used for a variety of secular activities called into serious question whether the chapel-prohibition advanced a genuinely compelling governmental interest by the least restrictive means. Pet. App. 32a.

Accordingly, the court remanded for further proceedings on petitioner's claims for injunctive relief on the chapel-access claim. Pet. App. 35a.

b. With respect to petitioner's request for damages on his cell-restriction and chapel-access claims, the Fifth Circuit affirmed, reasoning that RLUIPA provides no cause of action for damages against any of the defendants. Pet. App. 24a.

The court accepted that RLUIPA provides an express cause of action for "appropriate relief" against states and state officials in their official and personal capacities, Pet. App. 16a-17a, and noted that "appropriate relief" ordinarily includes damages. Pet. App. 16a n.26. Referring to this Court's decision in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), the Fifth Circuit explained that "the Supreme Court has instructed us to 'presume the availability of all appropriate remedies unless Congress has clearly indicated otherwise' or given guidance by a 'clear indication of its purpose with respect to remedies.'" Pet. App. 16a n.26 (quoting *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (citing *Franklin*, 503 US. 68-69)).[2] And, the court of

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[2] In *Franklin*, this Court held that the implied private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 to 1688 – a federal Spending Clause statute that prohibits sex discrimination in federally funded education programs – affords injured plaintiffs all "appropriate relief," including damages. 503 U.S. at 76. In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Court elaborated that "appropriate relief" under Spending Clause legislation extends to "not only those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in

appeals noted, "[t]here is no clear or express indication in RLUIPA that damages are unrecoverable." Pet. App. 16a n.26.

Despite RLUIPA's "plain language," Pet. App. 16a, and this Court's precedents, Pet. App. 17a & n.30, 20a, the court of appeals held that damages were constitutionally unavailable. The court first held that Congress lacked the constitutional power to authorize RLUIPA damages claims against state officials in their individual capacities because the officials did not personally accept federal funding and thus, in the court of appeals' view, they did not fall within Congress's legislative jurisdiction under the Spending Clause. Pet. App. 20a. RLUIPA, the court reasoned, was enacted pursuant to Congress's Spending Clause power and, as a result, "only the grant recipient – the state – may be liable for its violation." Pet. App. 17a. Although Congress may attach funding conditions that require recipient governments to regulate third parties, the court of appeals held, Congress has no constitutional authority under the Spending Clause to regulate directly the conduct of non-recipients. Pet. App. 18a-20a.

The court acknowledged that its holding conflicted with the decisions of other courts, noting that there is a "split in the district courts," Pet. App. 16a, on the question and that "[a] number of circuits

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suits for breach of contract," including "compensatory damages and injunction." *Id.* at 187.

appear to have assumed that an individual-capacity cause of action for damages exists." Pet. App. 15a.

With respect to the State and state officials in their official capacities, the court of appeals held that compensatory relief was "barred by Texas's sovereign immunity." Pet. App. 20a. The Court recognized that Congress may require a state to waive its sovereign immunity as a condition of receiving federal funds, but explained that whether RLUIPA provides states sufficiently clear notice of their liability for damages is the subject of "a circuit split." Pet. App. 21a (citing *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), and *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006)). Siding with the Fourth Circuit, and rejecting the view of the Eleventh, the court concluded that "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief." Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

This Court's review of the court of appeals' decision holding that RLUIPA does not authorize an award of compensatory damages against state defendants is warranted. The Fifth Circuit held, in acknowledged conflict with the rulings of other courts, that the Constitution compels judicial disregard of RLUIPA's textual authorization of compensatory damages. The constitutional implications of that ruling, which effectively declares unconstitutional a key enforcement provision of a federal civil rights law, merit this Court's review in their own right. The necessity of such review is

compounded by the divergent rulings of lower courts, which leave both states and individuals facing uncertainty and disparity in the enforcement of a single national law based on nothing more than accidents of geography.[3]

I. Courts Are Divided Over The Availability Of Compensatory Damages Against State Defendants Under RLUIPA.

There is no dispute that RLUIPA authorizes suits against state governments, state officials, and individuals acting under color of state law. 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4) . And RLUIPA expressly authorizes courts to award "appropriate relief" against such defendants. *Id.* § 2000cc-2. Congress, moreover, enacted RLUIPA's "appropriate relief" provision against the backdrop of this Court's specific holding in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), that "appropriate relief" includes compensatory damages, *id.* at 66-68. For that reason, courts broadly agree that, as a textual matter, RLUIPA authorizes suits for monetary damages against states and state officials in their official and individual capacities. Nonetheless, the federal courts are divided in multiple respects over whether Congress constitutionally authorized such relief in

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[3] Because the decision below draws into question the constitutionality of an Act of Congress, and the United States has not participated as a party in this case thus far, a copy of this petition has been served upon the Solicitor General of the United States as required by Rule 29.4(b) of the Rules of this Court. *See also* 28 U.S.C. § 2403(a).

light of the constraints of the Eleventh Amendment and the Spending Clause. This Court's review is necessary to restore uniformity to the law and to uphold RLUIPA's constitutionality.

A. Courts Are Divided Over Whether The Eleventh Amendment Precludes Damages Awards Under RLUIPA Against States And State Officials In Their Official Capacities.

"[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).[4] Congress may, however, condition receipt of federal funds upon a state's waiver of that sovereign immunity so long as Congress makes the condition clear. *See, e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

As both the Fourth and Eleventh Circuits have recognized, and the Fifth Circuit in this case acknowledged, Pet. App. 21a, "[t]o put it mildly, 'there is a division of authority' on th[e] question" whether RLUIPA makes sufficiently clear to the states that acceptance of federal funding for state prisons will render them subject to suits for monetary damages. *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (quoting *Madison v. Virginia*, 474 F.3d

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[4] "This bar remains in effect when State officials are sued for damages in their official capacity" because "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents." *Id.* (citations omitted).

118, 130 n.3 (4th Cir. 2006)); *see also Cardinal v. Metrish*, No. 08-1652, 2009 WL 1098759, at *3 (6th Cir. Apr. 24, 2009) ("There is . . . no consensus among the other Circuits as to whether a State's acceptance of federal prison funds constitutes a waiver of its sovereign immunity as to RLUIPA claims for damages.").

The Eleventh Circuit held in *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), that a state waives its sovereign immunity to private suits under RLUIPA by accepting federal funds. *Id.* at 1305-06. In *Smith v. Allen*, 502 F.3d 1255, *reh'g denied*, 277 Fed. Appx. 979 (11th Cir. 2008), the Eleventh Circuit held that the waiver of sovereign immunity in RLUIPA includes suits for money damages. Tracking this Court's decision in *Franklin*, the court of appeals held that "the phrase 'appropriate relief' in section 3 of RLUIPA is broad enough to encompass the right to monetary damages in the event a plaintiff establishes a violation of the statute." 502 F.3d at 1270. As in *Franklin*, the Eleventh Circuit concluded that, "where Congress had not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies" – including monetary damages. 502 F.3d at 1270 (citing *Franklin*, 503 U.S. at 68-69). "We assume," the Eleventh Circuit explained, "that, when Congress [enacted RLUIPA], it was aware of *Franklin*'s presumption in favor of making all appropriate remedies available to the prevailing party." *Smith*, 502 F.3d at 1271. Accordingly, because Congress "expressed no intent to the contrary," the court concluded that RLUIPA must be construed to authorize "monetary as well as

injunctive relief." *Id.* at 1270-71. Accordingly, in contradistinction to the Fifth Circuit's decision here, the Eleventh Circuit concluded that "the Eleventh Amendment will not shield the state (and [its] agents) from an official capacity action for damages under RLUIPA." *Id.* at 1276 n.12.

In contrast, the Fourth Circuit – like the Fifth Circuit in this case – has held that states do not waive their sovereign immunity to RLUIPA suits for monetary damages by accepting federal funds for their prisons. In *Madison v. Virginia*, the Fourth Circuit acknowledged that, "[w]ith respect to sovereign immunity . . . Congress unambiguously conditioned federal funds on a State's consent to suit." 474 F.3d at 122. The Fourth Circuit nevertheless concluded that the Eleventh Amendment bars claims for monetary relief because "that condition does not clearly and unequivocally indicate that the waiver extends to *money damages*." *Id.* at 122-23 (emphasis added).

The Sixth Circuit has now joined suit. In *Cardinal v. Metrish*, that court rejected an inmate's contention that Michigan, by accepting federal prison funds, had waived its sovereign immunity from RLUIPA claims for money damages. The court acknowledged the contrary holding of the Eleventh Circuit but opted to follow the decisions of the Fourth and Fifth Circuits, holding that, "because RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA." 2009 WL 1098759, at *5.

In sum, had petitioner's claim arisen a few states to the east, the outcome of his case would have been the opposite of the Fifth Circuit's decision here and he would have been permitted to pursue his claim for damages against the states and state officials in their official capacities. By the same token, state governments in Alabama, Georgia, and Florida face liability for damages that their counterparts to the west and north do not.

B. Courts Are Also Divided Over Whether RULIPA Constitutionally Authorizes Damages Suits Against State Officials In Their Individual Capacities.

1. Federal courts are likewise divided over whether RLUIPA authorizes, and the Spending Clause permits, suits for monetary damages against state officials in their individual capacities. *See, e.g.*, *Mayfield v. Tex. Dep't of Crim. Justice*, 529 F.3d 599, 605 n.8 (5th Cir. 2008) ("Whether RLUIPA contemplates damages actions against officers in their individual capacity has also created disagreements amongst courts."); *Madison*, 474 F.3d at 130 n.3 (acknowledging disagreement).

The Fifth Circuit in this case accepted that the text of RLUIPA naturally provides for damages claims against officials acting in their individual capacities, Pet. App. 15a-16a, because "appropriate relief" includes damages and "government" includes state officials and individuals acting under color of law. In designing those provisions, the court of appeals recognized, Congress copied the textual design of 42 U.S.C. § 1983, which provides for damage claims against state officials in their

individual capacities. *See* Pet. App. 17a.[5] Nonetheless, the Fifth Circuit refused to give effect to Congress's direction because, in its view, Congress lacks the constitutional authority under the Spending Clause to authorize such relief. Pet. App. 19a-20a. The Eleventh Circuit has reached the same conclusion. *See Smith*, 502 F.3d at 1273 (declining to construe RLUIPA to provide a personal-capacity cause of action for damages because "Congress cannot use its Spending Power to subject a non-recipient of federal funds, including a state official acting [in] his or her individual capacity, to private liability for monetary damages").

As the Fifth Circuit acknowledged, however, "[a] number of circuits appear to have assumed that an individual-capacity cause of action for damages exists because the courts have conducted, or on remand have required that the district court conduct, a qualified immunity analysis" or have applied restrictions on damages under the Prison Litigation Reform Act — analyses that would be "unnecessary" if a private right of action against defendants in their individual capacities for damages were not available. Pet. App. 15a-16a & n.23 (collecting cases); *see also Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (ordering entry of summary judgment against prison officials sued for damages in their individual capacities under RLUIPA); *Salahuddin v. Goord*, 467

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[5] Indeed, if anything Congress provided even more explicitly in RLUIPA that state officials were subject to suit, as Section 1983 merely refers to "any person" acting under color of law, without expressly referring to state officials.

F.3d 263 (2d Cir. 2006) (reversing grant of qualified immunity on RLUIPA claims); *Ahmed v. Furlong*, 435 F.3d 1196 (10th Cir. 2006) (remanding for qualified immunity analysis).[6] Thus, in practice the availability of RLUIPA damages against government defendants in their individual capacities varies widely from circuit to circuit.

The district courts are also deeply divided over the availability of individual-capacity damages under RLUIPA. *See Lovelace v. Lee*, 472 F.3d 174, 196 n.7 (4th Cir. 2006) (collecting cases). In *Agrawal v. Briley*, No. 02 C 6807, 2006 WL 3523750, at *13 (N.D. Ill. Dec. 6, 2006), for example, the court expressly held that "RLUIPA's remedial provision, creating a private cause of action for 'appropriate relief against a government,' authorizes individual-capacity claims for monetary damages." *See also, e.g., Orafan v. Goord*, No. 00CV2022, 2003 WL 21972735, at *9 (N.D.N.Y. Aug. 11, 2003) (holding that the "plain language of the statute" "[c]learly . . . contemplates individual liability" for damages); *Farnsworth v. Baxter*, No. 03-2950-B/V, 2007 WL 2793364 at *2 (W.D. Tenn. Sept. 26, 2007) (same). By contrast, other district courts have held that RLUIPA does not authorize suits for damages against officials in their individual capacities. *See, e.g., Cromer v. Braman*, No. 1:07-cv-009, 2009 WL 806919, at *8 (W.D. Mich.

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[6] *See also Walker v. Iowa Dep't of Corr.*, 298 Fed. Appx. 535 (8th Cir. 2008); *Figel v. Overton*, 263 Fed. Appx. 456 (6th Cir. 2008); *Haley v. Donovan*, 250 Fed. Appx. 202 (9th Cir. 2007); *Sefeldeen v. Alameida*, 238 Fed. Appx. 204 (9th Cir. 2007).

Mar. 25, 2009); *Morris-El v. Menei*, No. Civ.A. 00-200J, 2006 WL 1455592, at *3 (W.D. Pa. May 22, 2006).

2. This wide-ranging conflict reflects a broader confusion and division in the lower courts over the scope of Congress's power under the Spending Clause. The Fifth and Eleventh Circuits have adopted a narrow interpretation of Congress's Spending Clause authority, refusing to recognize the Spending Clause as a source of authority for the enactment of positive law reaching the conduct of third parties. Instead, those courts view the Spending Clause as limiting Congress to attaching conditions to a "contract" that may bind only the recipients of federal funding. *See* Pet. App. 17a ("Spending Clause legislation is not legislation in its operation; instead it operates like a contract."); *Smith*, 502 F.3d at 1274 (concluding that in light of "the limited reach of Congress' Spending Power," the Spending Clause "cannot be used to subject individual defendants, such as state employees, to individual liability in a private cause of action"); *see also United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., specially concurring) ("While Congress may disburse funds under this grant of power, Congress may not make laws.").

By contrast, other circuits have recognized Congress's affirmative legislative and regulatory power under the Spending Clause. In *Westside Mothers v. Haveman*, 289 F.3d 852, 857-60 (6th Cir. 2002), for example, the Sixth Circuit rejected the assertion that Medicaid Act rights could not be enforced under 42 U.S.C. § 1983 because, as Spending Clause legislation, the Act was merely a

"contract" and not "law" within the meaning of Section 1983. *Id.* at 858. The Sixth Circuit explained that, while "the term 'contract'" has been used "metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government," that does not mean that Spending Clause legislation "is *only* a contract." *Id.* (emphasis in original); *see also Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002) (rejecting argument that claims under Medicaid Act fell outside of *Ex parte Young* exception to sovereign immunity because "the Medicaid Act, as Spending Clause legislation, is not 'supreme' law" but merely a contract); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1040-41 (8th Cir. 2002) (rejecting same argument with respect to the Child Welfare Act).

Members of this Court, too, have acknowledged the disputed status of Spending Clause legislation. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (questioning whether private causes of action are permissible under the Medicaid Act because the "contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation – through pre-emption or otherwise"); *Barnes v. Gorman*, 536 U.S. 181, 191 (2002) (Souter, J., concurring) (noting that "the contract-law analogy may fail to give such helpfully clear answers to other questions that may be raised

by actions for private recovery under Spending Clause legislation").[7]

The decision in this case gives concrete effect to that divergence in court views on a critically important and frequently recurring question of constitutional law. This Court's review is needed to bring stability and uniformity to the law and to the enforcement of federal statutes nationwide.

II. This Court's Review Is Warranted Both To Resolve The Circuit Conflict And To Review The Fifth Circuit's Partial Invalidation Of An Act Of Congress.

The Fifth Circuit's decision warrants review both because it exacerbates long-standing divisions among the federal courts and because it effectively declares unconstitutional a provision of an important federal civil rights statute.

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[7] That same uncertainty is reflected in academic literature. *Compare* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994) (arguing that under the Spending Clause, Congress is limited to attaching conditions to federal funding and may not enact positive law), *and* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003) (arguing that Congress may not use its Spending Power to enact criminal laws that apply to non-recipients of federal funding), *with* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345 (2008) (disputing assertion that Congress lacks authority to enact positive law under the Spending Clause)

A. Review Is Warranted To Resolve The Division Of Authority Over The Availability Of RLUIPA Damages Claims Against State Defendants.

1. The division of authority over the scope of RLUIPA's express cause of action is widespread and mature. The multiple conflicting decisions have given significant attention to the question presented, yet have reached flatly contradictory conclusions.

The conflict is also entrenched, capable of resolution only by this Court. The Eleventh Circuit has twice denied rehearing en banc in cases conflicting with the Fifth Circuit's decision, *Smith v. Allen*, 277 Fed. Appx. 979 (11th Cir. 2008) (order denying rehearing); *Benning v. Georgia*, 129 Fed. Appx. 603 (11th Cir. 2005) (same), and reaffirmed its position recently, *see Hathcock v. Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008). The Fifth Circuit, for its part, reached its decision fully cognizant of the contrary authority, and has already applied its decision in subsequent cases. *See Garner v. Morales*, No. 07-41015, 2009 WL 577755, at *2 (5th Cir. Mar. 6, 2009) (unpublished); *Smithback v. Crain*, No. 07-10274, 2009 WL 552227, at *2 (5th Cir. Mar. 5, 2009) (unpublished).

Thus delaying review will only exacerbate, not eliminate, the circuit conflict. The critical analytical debate has already been fully ventilated, with much of the division turning on debates over the meaning of *this Court*'s precedent. Courts in future cases will simply pick a side without further analysis, as the Sixth Circuit recently did. *See, e.g., Cardinal v. Metrish*, No. 08-1562, 2009 WL 1098759 at *2-*3 (6th

Cir. Apr. 24, 2009). Only this Court can bring the needed clarity to its precedent and provide stabilizing direction to the lower courts.

2. As this Court's review four years ago in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), reflected, constitutional and interpretive questions arising under RLUIPA are important both to states and institutionalized persons, and the issues recur with great frequency. As the extensive division in lower courts illustrates, the constitutionally permissible scope of RLUIPA's remedial provision regularly arises in prisoner litigation. That is not surprising because RLUIPA affects inmates throughout the country, many of whom, Congress found, face precisely the kind of "frivolous or arbitrary" barriers to religious exercise that RLUIPA was designed to address. *Cutter*, 544 U.S. at 716 (citation omitted).

Furthermore, the availability of monetary damages under RLUIPA is vital to remedying and deterring violations of the rights Congress intended the statute to provide, not simply to inmates, but also to religious groups facing discriminatory land use practices. *See* 42 U.S.C. § 2000cc.[8] Without a damages remedy, there is a high risk of under-enforcement: as this case illustrates, officials often may avoid liability altogether by complying with the statute once sued. *See* Pet. App. 12a-13a; *see also*,

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[8] *Cf., e.g., Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 658-60 (D. Md. 2009) (relying on *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), to find no personal-capacity liability for defendants in land use case).

e.g., *Cardinal*, 2009 WL 1098759, at *2 (finding inmate's claims arising from transfer to prison that did not provide kosher meals moot in light of policy modification and the unavailability of damages remedy); *Watts v. Dir. of Corr.*, No. CV F-03-5365, 2006 WL 2320524, at *7 (E.D. Cal. Aug. 10, 2006) (RLUIPA claim moot in light of a prison's policy modification allowing plaintiff to wear his hair long); *Boles v. Neet*, 402 F. Supp. 2d 1237, 1241 (D. Colo. 2005) (RLUIPA claim moot after prison modified its policy to allow inmates to wear religious garb during transport outside of prison); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005).

Moreover, even if the Fifth Circuit were right on the merits, review would still be warranted because states and prison officials across the country continue to be subject to suit for damages under RLUIPA, *see supra* at 12-19 & n.6, bearing a burden that – if the Fifth Circuit is correct – the Constitution forbids Congress to impose upon them.

3. This case presents an appropriate vehicle for resolving the question presented. The Fifth Circuit's opinion below squarely addressed the question. And its answer was outcome determinative with respect to petitioner's claims for damages and to petitioner's cell-restriction challenge in its entirety. *See* Pet. App. 12a, 24a.

B. Review Is Also Warranted Because The Court of Appeals Partially Invalidated An Act Of Congress.

This Court's prompt review is particularly warranted because the Fifth Circuit's decision had the effect of declaring unconstitutional RLUIPA's widely acknowledged textual authorization of compensatory damages.

The court of appeals accepted that RLUIPA's express cause of action reaches states and state officials in their official and individual capacities, Pet. App. 17a, 20a, as has the Eleventh Circuit, *Smith v. Allen*, 502 F.3d 1255, 1270-71 (11th Cir. 2007). Moreover, the Fifth Circuit accepted, as this Court and the Eleventh Circuit have held, that the phrase "appropriate relief" includes damages remedies. *See* Pet. App. 16a-17a; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66-68 (1992); *Smith*, 502 F.3d at 1269-71. Nonetheless, both the Fifth and Eleventh Circuits have held that giving the statute its plain meaning would violate the Constitution. *See* Pet. App. 20a; *Smith*, 502 F.3d at 1272-75. As a result, for purposes of this Court's certiorari jurisdiction, the Fifth Circuit's decision in this case, like the Eleventh Circuit's before it, reflects the constitutional nullification of an important provision of an Act of Congress.[9]

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[9] To be sure, the court cast its decision in statutory construction terms, purporting to construe "appropriate relief" narrowly "to avoid the constitutional concerns that an alternative reading would entail." Pet. App. 20a. But while constitutional avoidance principles allow courts to construe a

This Court has consistently granted certiorari to review decisions declaring federal statutes unconstitutional, even when those statutes have far less frequent application than RLUIPA. *See, e.g.*, *United States v. Stevens*, __ S. Ct. __, 2009 WL 1034613 (Apr. 20, 2009); *United States v. Morrison*, 529 U.S. 598 (2000); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Clinton v. City of New York*, 524 U.S. 417 (1998); *see also* STERN & GRESSMAN, SUPREME COURT PRACTICE 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case."). It should do so again here.

III. Review Is Warranted Because The Court Of Appeals' Decision Conflicts With The Decisions Of This Court.

Review is also warranted because the court of appeals' decision is wrong, based on a misunderstanding of this Court's decisions and the scope of Congress's constitutional powers.

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statute to avoid constitutional difficulties, *see Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001), those principles do not permit courts to go so far as to give a statute an untenable construction simply to avoid a constitutional holding. *See Salinas v. United States*, 522 U.S. 52, 60 (1997) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)); *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 407 (1950). Nor should this Court's traditional review of the invalidation of an Act of Congress be avoided by recasting in statutory construction terms what is, at its heart, a constitutional holding.

A. The Eleventh Amendment Does Not Bar RLUIPA Suits For Damages Against States And State Officials In Their Official Capacities.

The Fifth Circuit rightly recognized that Congress clearly conditioned receipt of federal prison funding on a state's waiver of sovereign immunity to RLUIPA suits for "appropriate relief." Pet. App. 14a-15a. *See also Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) ("RLUIPA unambiguously conditions federal prison funds on a State's consent to suit."). The court was likewise correct in concluding that states were on notice that "appropriate relief" includes declaratory and injunctive relief. *Id.* The court fundamentally departed from this Court's precedent, however, in deciding that states were not on notice that "appropriate relief" included money damages.

1. In *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court recognized that states have ample notice that the receipt of federal funds binds them to comply with the substantive conditions attached to the funding or face damages liability. *Barnes* addressed the remedies available for violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 to 12165, which statutorily authorizes recovery of the same remedies provided under Section 505 the Rehabilitation Act of 1973, 29 U.S.C. § 794a. *See* ADA, 42 U.S.C. § 12133. The Rehabilitation Act, in turn, incorporates the remedies available under a Spending Clause statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. *See* Rehabilitation Act, 29 U.S.C. § 794a(a)(2). Title VI does not include an express cause of action (much

less any enumerated list of remedies). However, the Court had previously found an implied private right of action under Title VI. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979). And in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court had

> recognized "the traditional presumption in favor of any appropriate relief for violation of a federal right," and held that since this presumption applies to suits under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, monetary damages were available.

Barnes, 536 U.S. at 185 (quoting *Franklin*, 503 U.S. at 73).

The Court in *Barnes* concluded that the same was true of Title VI, *id.*, then turned to the central question in that case and this one: what constitutes the "appropriate relief" to which states are subject, explaining that "a remedy is 'appropriate relief,' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." 536 U.S. at 187 (emphasis in original). Critically, the Court then held that

> A funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract.*

Id. (emphasis added, citations omitted). This includes, the Court specifically noted, "compensatory damages." *Id.*

The Fifth Circuit's decision is irreconcilable with *Barnes*, which establishes that Texas was on notice that its acceptance of federal prison funds subjected it "to those remedies traditionally available in suits for breach of contract," including "compensatory damages." *Barnes*, 536 U.S. at 187. Thus, even if RLUIPA, like Title VI and Title IX, said nothing about available remedies, Texas would be on notice that accepting funds would subject it to suit for damages under RLUIPA. But Texas had even greater forewarning here because Congress expressly provided in the text of RLUIPA that "appropriate relief" was available, employing a phrase that has a settled meaning in this Court's Spending Clause decisions that has included compensatory damages since the Court's decision almost two decades ago in *Franklin*.

2. The Fourth, Fifth, and Sixth Circuits thus have erred in construing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Lane v. Pena*, 518 U.S. 187 (1996), as requiring Congress to spell out damages remedies in explicit terms. *Pennhurst* requires that the consequences of accepting federal funding must be clear, 451 U.S. at 17, but *Barnes* and *Franklin* both held that the availability of compensatory damages *is* clear.

Nor is anything in *Lane* to the contrary. There, this Court considered two provisions of the Rehabilitation Act. The first, Section 504(a), prohibits disability discrimination in any federally funded program or under "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). However, a separate provision, Section 505(a)(2), establishes the available remedies for a

violation of the latter requirement, providing that the remedies available under Title VI (which, as noted above, include money damages), "shall be available to any person aggrieved by . . . any . . . *Federal provider of [financial] assistance*." 29 U.S.C. § 794a(a)(2) (emphasis added). This Court held that, although the federal defendant before it (the Merchant Marine Academy) was subject to Section 504(a) as an "Executive agency," it was not subject to suit for damages because it did not fall within the narrower term "Federal provider" in Section 505(a)(2)'s remedial provision waiving the federal government's sovereign immunity. 518 U.S. at 192-93.

Lane is thus inapposite here. Texas – a "government" by common understanding and under RLUIPA's express definition – falls squarely within the terms of RLUIPA's remedial provision. And in *Lane*, the Court quite plainly proceeded on the understanding that if the Merchant Marine Academy counted as a "Federal provider" under the Rehabilitation Act (as Texas counts as a "government" under RLUIPA), then Congress would have waived its sovereign immunity to suits for damages by subjecting it to the "appropriate relief" available for suits under Title VI. *See* 518 U.S. at 194-95.

To be sure, in *Lane*, this Court recognized that the otherwise settled meaning of "appropriate relief" could be altered by explicit contrary indications in the text of a statute that expressly addresses available remedies. 518 U.S. at 196-97. But there are no such counterindications in RLUIPA. To the contrary, everything in the statute confirms that

Congress intended the usual rule, including the presumption in favor of damages liability, to apply.

First, in authorizing "appropriate relief," Congress used language with a settled meaning in the Spending Clause context that gave states ample notice of the consequences of their actions. The Fifth Circuit thus was obliged to hew to that established meaning. *See Neder v. United States*, 527 U.S. 1, 21 (1999) (where terms have "accumulated settled meaning," a "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms") (internal quotation marks omitted).

Second, where Congress intended RLUIPA to depart from that traditional understanding, it did so expressly. In Section 2000cc-2(f), Congress limited the relief available when the federal government brings suit, allowing the United States to sue only "for injunctive or declaratory relief to enforce compliance with this chapter." Had Congress intended the same scope for private suits, it presumably would have used the same language.

Finally, to the extent a state accepted funding in the hope that courts might subsequently give the statute an especially narrow construction, that expectation would have been entirely unreasonable, for Congress provided that the statute "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the

terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).[10]

B. Congress Did Not Exceed Its Constitutional Authority By Imposing Personal Liability On State Officials Who Violate RLUIPA.

The Fifth Circuit also erred in holding that Congress lacks the constitutional power to impose personal liability on state officials.

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[10] RLUIPA also falls within the scope of 42 U.S.C. § 2000d-7(a), which provides that:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . the provisions of any [] Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation.

As a statute forbidding religious discrimination by recipients of federal funds, RLUIPA qualifies as a statute triggering a waiver of state sovereign immunity under this provision. *See Sisney v. Reisch*, 533 F. Supp. 2d 952, 971-72 (D.S.D. 2008), *appeal docketed* Apr. 22, 2008. Although petitioner did not cite to this provision in the lower courts, the Fourth Circuit decision upon which the court of appeals relied discussed the applicability of Section 2000d-7 in detail. *See Madison v. Virginia*, 474 F.3d 118, 132-33 (4th Cir. 2006); Pet. App. 21a-24a.

1. Congress has ample authority under the Spending Clause, supplemented by the Necessary and Proper Clause, to make state officials liable for conduct that interferes with the implementation of valid conditions on federal financing and with the effective implementation of a federal spending program.

Although this Court has sometimes analogized Spending Clause legislation to a contract, the Court has also made clear that the analogy is only partial. *See, e.g.*, *Barnes*, 536 U.S. at 186 (noting that the Court has been "careful not to imply that *all* contract-law rules apply to Spending Clause legislation" (internal citations omitted)). Indeed, this Court has repeatedly recognized that Spending Clause legislation is not simply a contract provision, but rather has the force and status of federal law. *See, e.g.*, *Bennett v. Ky. Dep't of Ed.*, 470 U.S. 656, 669 (1985) ("Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."); *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) (invalidating under the Supremacy Clause certain provisions of state law that conflicted with federal regulations promulgated under a federal spending program); *Carleson v. Remillard*, 406 U.S. 598, 600, 604 (1972) (same); *Townsend v. Swank*, 404 U.S. 282, 285 (1971) (same).

In enacting positive law under its Spending Power, Congress is not limited to appropriating money, or even to attaching conditions on federal funding. Instead, it may enact any law that is "necessary and proper for carrying into Execution" its

Spending Clause authority. U.S. CONST. art. I, § 8, cl. 18; *see, e.g.*, *Sabri v. United States*, 541 U.S. 600, 605 (2004); *New York v. United States*, 505 U.S. 144, 158-59 (1992). Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court has recognized that the Necessary and Proper Clause confers on Congress broad power to ensure the efficacy of the exercise of its enumerated powers: "If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect." *Id.*

The Necessary and Proper power thus provides Congress authority to remove impediments to the proper and effective exercise of its enumerated powers. Congress's power to regulate commerce, for example, is not limited to regulating only individuals engaged directly in commerce, but also those whose actions might impede commerce or Congress's regulatory regime. *See, e.g.*, *United States v. Coombs*, 37 U.S. 72, 78 (1838) (noting that "[a]ny offence which thus interferes with, obstructs, or prevents such commerce and navigation . . . may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers"). Likewise, this Court has held that Congress's power "'to establish post-offices and post-roads'" encompasses the power to regulate individual conduct that interferes with postal services, including the power to "'punish those who steal letters.'" *McCulloch*, 17 U.S. at 417.

So, too, Congress has authority under the Spending Clause not only to spend money on

programs that advance the public welfare, but also to regulate third parties who may impede the effective operation of those programs. Thus, in *Sabri v. United States*, this Court upheld against a Spending Clause challenge a federal statute, 18 U.S.C. § 666(a)(2), that criminalizes bribery of state and local officials of agencies that accept federal funding. 541 U.S. at 610. Although the state officials in *Sabri*, like the individual defendants here, were not "parties to the contract" between the United States and the governmental funding recipient, this Court concluded, without a single dissent, that Congress had the authority to directly regulate individual officials' conduct and to impose personal – indeed, criminal – liability upon those officials who violate those federal limitations. "Congress," the Court emphasized, "does not have to sit by and accept the risk of operations thwarted by local and state improbity." 541 U.S. at 605. Because subjecting state officials to criminal liability for bribery connected to a federal funding program was a rational means to "protect spending objects," this Court rejected Sabri's constitutional challenge. *Id.* at 608.

The same analysis should apply here. Congress acted within its Spending Clause powers when it subjected to personal liability state officials whose personal conduct thwarts Congress's enforcement of civil rights and defeats express conditions and terms imposed on the operation of federally funded prisons. The personal liability provisions of the statute rationally further not only Congress's general interest in ensuring compliance with valid funding requirements, but also Congress's more specific

interest in ensuring the efficacy of the federal funds spent in part to facilitate the rehabilitation of state prisoners. *See, e.g., Cutter v. Wilkinson*, 423 F.3d 579, 587 (6th Cir.) (noting that a "prison's compliance with RLUIPA still satisfies one of the statute's main purposes, which is to allow inmates greater freedom of religion in order to promote their rehabilitation"), *rev'd on other grounds*, 544 U.S. 709 (2005).

2. The Fifth Circuit further erred in assuming that Section 2000cc-2(a) of RLUIPA was enacted solely under Congress's Spending Clause authority. *See* H. REP. NO. 106-219, at 27 (1999) (invoking powers under the Spending Clause, Commerce Clause, and Fourteenth Amendment). In particular, Congress had ample authority to apply RLUIPA to state actors pursuant to its power to enforce the requirements of the Fourteenth Amendment. *See, e.g.*, Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 Whittier L. Rev. 493 (2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913

May 18, 2009

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Harvey Leroy SOSSAMON, III, Plaintiff-Appellant,

v.

The LONE STAR STATE OF TEXAS; Christina Melton Crain, Chairman, Texas Criminal Justice Board; Cathy Clement, Assistant Director, Texas Department of Criminal Justice-Correctional Institutions Division Region VI; Brad Livingston, Executive Director, Texas Department of Criminal Justice, Doug Dretke, Executive Director, Correctional Institutions Division; Reverend R.G. Murphy, Texas Department of Criminal Justice-Correctional Institutions Division Region VI Chaplaincy Regional Program Admin.; Senior Warden Robert Eason, French M. Robertson Unit, Texas Department of Criminal Justice-Correctional Institutions Division; Assistant Warden Stacy L. Jackson, French M. Robertson Unit, Texas Department of Criminal Justice-Correctional Institutions Division; Chaplain Paul J. Klien, French M. Robertson Unit, Texas Department of Criminal Justice-Correctional Institutions Division,
Defendants-Appellees.

No. 07-50632.

Feb. 17, 2009.

OPINION

WIENER, Circuit Judge:

We are asked today to resolve a number of questions concerning the extent to which, based on the special considerations we afford the government in its role as jail-keeper, we will excuse the intrusion of a state, here Texas, on the free exercise of religion by prisoners. We must also address several issues surrounding the remedies available when such an intrusion proves too great to excuse. Convinced that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") demands less intrusion than Texas exercised in one area, we reverse and remand in part; but, discerning no error otherwise, and taking note of the accommodations that Texas has offered the Plaintiff-Appellant Harvey Leroy Sossamon, III during the pendency of this appeal, we also affirm in part and dismiss some of his claims as moot with instructions to vacate.

I. FACTS AND PROCEEDINGS

Sossamon is an inmate of the Robertson Unit of the Texas Department of Criminal Justice (the "TDCJ")-Correctional Institutions Division. He alleges that (1) he has been deprived of access to Robertson's chapel for purposes of his Christian worship (the "chapel-use" claim or policy) and (2) while on cell restriction, he was forbidden to attend any worship services at all (the "cell-restriction" claim or policy).

Concerning the chapel-use claim, Sossamon provided competent summary judgment evidence that he is denied access to Robertson's chapel for Christian worship and that the venues for such worship offered as alternatives to the chapel do not have Christian

symbols or furnishings, such as an altar and cross, which "have special significance and meaning to Christians." This, he insists, prevents him from "kneeling at the alter [sic] in view of the Cross, to pray, or receive holy communion in obedience to Christ Jesus['s] command, to observe the Lord's Supper, by Christian ceremony, in remembrance of the divine sacrifice the Lord God made, for the atonement of plaintiff's sins at Calvary." Sossamon contends that even if this were not so, services and Bible study at the alternative venues are frequently interrupted by security personnel or noise from the prison yard. He alleges that if worshipers refuse to end their prayer or devotion and return to work when ordered, they are subjected to harassment and retaliation by prison guards, such as by strip searches.[1] He surmises that the prison has "evict[ed] and throw[n] God[ ] out of his house." According to Sossamon, this is not so for Muslim prisoners, whom he claims are provided special accommodations for worship, along with special meals, that Christians are not.

Concerning the cell-restriction claim, Sossamon has provided competent summary judgment evidence that inmates on cell restriction for disciplinary infractions were not permitted to attend religious services at all, even though they were permitted to attend work, to eat, to shower, to have medical lay-ins, to attend educational classes, to use the law library, and to participate in other secular activities. On September 15, 2005, Sossamon, who had been found

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[1] Sossamon does not allege that he has been subjected to a strip search and did not file an administrative grievance of this matter to the prison, as required by the Prison Litigation Reform Act ("the PLRA").

guilty of a minor rule infraction, was placed on cell restriction for fifteen days. During that time, he was twice denied permission to attend religious services.

Based on these allegations, Sossamon proceeded *pro se* against the "Lone Star State of Texas" and a number of individuals involved in the TDCJ[2] (collectively referred to as "Texas") under: (1) 42 U.S.C. § 1983, for violations of his First, Eighth,[3] and

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[2] They are: Christina Melton Crain (Chair of the Texas Board of Criminal Justice), Cathy Clement (Assistant Regional Director for Region VI of the TDCJ), Brad Livingston (Executive Director of the TDCJ), Doug Dretke (former Director of the TDCJ-Correctional Institutions Division; Nathaniel Quarterman, the current Director, automatically replaced Dretke as the defendant against whom the official-capacity claims are brought, *see* FED. R.APP. P. 43(c)(2)), Reverend R.G. Muphy (Region V Program Administrator for the Chaplaincy Department, Rehabilitation, and Reentry Programs Director of the TDCJ), Robert Eason (Senior Warden of Robertson), Stacy Jackson (Assistant Warden of Robertson), and Paul Klein (a volunteer chaplain at Robertson). All were sued in their personal and official capacities. Sossamon subsequently moved to dismiss all of his TRFRA individual-capacity claims against all defendants and to dismiss all claims against Murphy, Jackson, and Klein. Those motions were granted. The notice of appeal erroneously listed those defendants as parties, so they appear in our caption, but we note that they are now non-parties over whom we have no jurisdiction. *See Castillo v. Cameron County, Tex.*, 238 F.3d 339, 349-50 (5th Cir. 2001).

[3] The Eighth Amendment claim is completely abandoned on appeal. Mindful of our responsibility to construe *pro se* filings liberally, *see Al-Ra'id v. Ingle*, 69 F.3d 28, 31 (5th Cir. 1995), we nevertheless point out that the claim fails under the test announced in *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Sossamon has not demonstrated that the chapel-use policy and the cell-restriction policy deprive him of "the minimal civilized measure of life's necessities." *Id.*

Fourteenth Amendment rights; (2) RLUIPA;[4] and (3) the Texas Religious Freedom Restoration Act ("TRFRA").[5] He sought declaratory and injunctive relief against the defendants in their official capacities, along with compensatory and punitive damages from them in their official and individual capacities.

The parties cross-moved for summary judgment. On the cell-restriction policy, Texas noted that after Sossamon filed a grievance on this issue, the warden at Robertson amended the local cell-restriction policy by allowing prisoners at Sossamon's custody level (G-3) to attend worship services while on cell restriction. The Director of the Correctional Institutions Division of the TDCJ, Nathaniel Quarterman, submitted an affidavit during the pendency of this appeal advising that the TDCJ has adopted Robertson's relaxation of the cell-restriction policy for all Texas correctional facilities.

On the chapel-use claim, Texas concedes that

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[4] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

[5] TEX. CIV. PRAC. & REM.CODE ch. 110 (Vernon 2007). This claim has been abandoned on appeal. Again mindful of our duty to construe his briefs liberally, we point out that state law cannot be the basis on which a federal court either enters an injunction or an award of monetary relief against a state. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) ("The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment."). As Sossamon dismissed all of his individual-capacity claims under TRFRA, we have no need to further discuss them.

Sossamon-like all other prisoners-has been denied access to the Robertson chapel for congregational religious services during the entirety of his incarceration at Robertson. In fact, all religious worship is now prohibited at the chapel. The Senior Warden of Robertson, Robert Eason, submitted an affidavit justifying this restriction on safety and security grounds. He averred that Robertson has a policy of physically segregating prisoners in different buildings based on a number of factors. In addition to assignment based on custody level, the prison attempts to suppress gang activity by assignments to different buildings based on gang affiliations. Warden Eason contends that allowing prisoners to gather in one location would undercut his policy of segregating hostile gang members. Also, moving prisoners from building to building taxes the staff and creates security risks, problems that are exacerbated by Robertson's security-personnel staffing levels, which are typically below authorized strength because the work is difficult and the pay is low. By providing religious services at alternative locations[6]-such as in Building 4 of Robertson, where Sossamon is currently housed-prisoners need not be moved from one building to another, thereby relaxing the demands on security personnel and reducing the amount of interaction among segregated prisoners.

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[6] Texas offered competent summary judgment evidence that "numerous hours of religious services and instruction [other than at the chapel] are provided to inmates sharing [Sossamon's] faith."The district court also found that "it is clear ... [that prisoners have] access to religious books and materials ... for the practice of their faith."

Warden Eason also averred that the chapel poses special security concerns. Chaplains and religious volunteers would have to walk through groups of prisoners to lead services from the front of the room. If an incident were to occur, the religious personnel could be trapped. The location of the chapel in the main administrative building also exposes the non-security personnel of the prison (such as secretaries and support staff) to the risk of an incident. Further, the main administrative building has storage spaces that could be used for hiding weapons and contraband. Warden Eason based his concerns in part on his personal experience: While serving as a captain at a correctional facility, a difficult-to-control riot broke out in a chapel with a design similar to that of the Robertson chapel.

Finally, Warden Eason noted that the Robertson chapel can hold only around 75 people at a time, which makes it too small to hold the number of prisoners who routinely attend non-Roman Catholic Christian services. Instead, according to Warden Eason, the prison uses the chapel as a library for religious books, a meeting place for staff, and a facility for teleconferencing. Regarding the merits of Sossamon's claimed need for access to the chapel, the prison chaplain averred that "it is not a basic tenant [sic] of the Christian faith that services must be held in particular locations."

Sossamon replied to Warden Eason's assertions. In an affidavit, he contended that a number of the non-religious purposes for which the chapel is used present the same security risks as would religious services. For example, he contends that the chapel is used for "teaching convicted sexual predators and child molesters how to practice safe sex at TDCJ-sponsored

'Peer Education' classes." These classes are taught by a "small petite" female security officer who is "left alone with a group of men, and groups of men attending these classes are some times [sic] left unsupervised in the chapel." He also contends that prisoners "can enter the chapel for marriage seminars that begin on Friday afternoon and last until Sunday. During these seminars[,] prisoners['] wives are allowed to spend up to twelve (12) hours inside the chapel with them." Prisoners who obtain a GED are given a celebration inside the chapel, "including contact visits with free world members of their family and with friends." Finally, he alleges that prisoners are permitted to use the chaplain's office to make phone calls at night, but not to enter the chapel and pray at the cross.

The district court granted summary judgment to the defendants, reasoning that (1) Eleventh Amendment sovereign immunity bars Sossamon's claims for monetary relief from Texas and the defendants in their official capacities, (2) the defendants are entitled to qualified immunity from suit for damages in their individual capacities because no violation of Sossamon's rights occurred, and (3) Sossamon did not demonstrate that injunctive relief under TRFRA or his federal claims is proper. The district court also refused to appoint counsel. This timely appeal followed, and we appointed appellate counsel.

II. ANALYSIS

1. Mootness

a. Standard of Review

We review *de novo* matters of justiciability, such as mootness, that affect our jurisdiction to hear a case.[7]

b. Merits

Texas contends that Sossamon's claims for injunctive relief based on Robertson's cell-restriction policy are moot because Director Quarterman has certified that Texas has ended the policy of preventing general-population prisoners on cell restriction from attending religious services. We were apprised of the change in policy and Texas's argument that Sossamon's injunctive-relief claims are now moot in a Federal Rule of Appellate Procedure 28(j) letter accompanied by an affidavit from Director Quarterman. As support for the conclusion that its voluntary cessation of the challenged conduct moots the case, Texas cites *Staley v. Harris County, Texas,* in which we held that an appeal raising First Amendment challenges to a New Testament Bible monument became moot after the defendant, Harris County, Texas, removed the monument.[8] We further held in *Staley* that any concern about a possible redisplay of the monument in the future was not yet ripe because "there are no facts before us to determine whether such a redisplay might violate the

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[7] *United States v. Lares-Meraz,* 452 F.3d 352, 355 (5th Cir. 2006) (per curiam).

[8] 485 F.3d 305, 309 (5th Cir. 2007) (en banc) (citing *Harris v. City of Houston,* 151 F.3d 186, 189 (5th Cir. 1998) ("[W]e find it beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined.")).

Establishment Clause."[9]

If the controversy between Sossamon and Texas has resolved to the point that they no longer qualify as "adverse parties with sufficient legal interests to maintain the litigation," we are without power to entertain the case.[10] This general rule is subject to several important exceptions however. For example, the voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case: If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief.

The Supreme Court has recently addressed this exception to mootness. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court said that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."[11] Further, "the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

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[9] *Id.*

[10] *Lares Meraz*, 452 F.3d at 354 (internal quotation marks omitted).

[11] 528 U.S. 167, 189 (2000) (internal quotation marks omitted).

recur."[12] This is a "heavy burden," which must be born by the party asserting mootness.[13]

On the other hand, courts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity[14]--a practice that is reconcilable with *Laidlaw*. Although *Laidlaw* establishes that a defendant has a heavy burden to prove that the challenged conduct will not recur once the suit is dismissed as moot, government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.

Under this lighter burden to make "absolutely clear" that the cell-restriction condition cannot "reasonably be expected to recur," Director

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[12] *Id.*

[13] *Id.*

[14] *See, e.g., Zepeda v. Boerne Indep. Sch. Dist.*, 294 F. App'x 834, 840 n.9 (5th Cir. 2008) (unpublished) (citing *McCrary v. Poythress*, 638 F.2d 1308, 1310 & n. 1 (5th Cir. 1981); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988); 13C CHARLES ALANWRIGHT, ARTHUR R. MILLER & EDWARD H.COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.7 n.6 (West 2008)). Our case that *Zepeda* cites pre-dates *Laidlaw* and only cites to a Supreme Court case that dealt with the "capable of repetition, yet evading review" exception, not the voluntary-cessation exception to mootness. The Seventh Circuit case *Zepeda* cited is on point.

Quarterman's affidavit is sufficient. In it, he swears that the he is the party responsible for enforcing administrative directives of the TDCJ, that the Executive Director of the TDCJ revised the relevant administrative directive, and that prisoners on cell restriction will now be permitted to attend religious services. Any claim that Sossamon might be removed from the general population is too speculative to avoid mooting the case; we cannot foresee how a claim made by a prisoner presenting special security concerns may differ. Further, the fact that the change in policy is now state-wide obviates any concern that local prison officials might change their minds on a whim or that Sossamon might be transferred to a facility with different rules.

We will not require some physical or logical impossibility that the challenged policy will be reenacted absent evidence that the voluntary cessation is a sham for continuing possibly unlawful conduct. The good faith nature of Texas's cessation is buttressed by the fact that Sossamon did not obtain relief below. Had the trial court granted the injunction, we might view any attempt to force a vacatur of such a determination (particularly in favor of a *pro se* prisoner) with a jaundiced eye. As things stand, Texas has given Sossamon that which he did not obtain in the district court and that which there at least existed a possibility he might not have obtained here. We therefore dismiss as moot those parts of the appeal that relate to Sossamon's claims for injunctive and declaratory relief from the erstwhile cell-restriction policy (but not his claims for damages based on the September 2005 enforcement of that restriction) with instructions that the district court vacate these

portions of its opinion as well.[15]

2. RLUIPA

a. Standard of Review

We review a district court's grant of summary judgment (and a district court's statutory interpretation) *de novo*, using the same standards as the district court.[16] "Summary judgment [should be granted] when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law."[17] The movant's initial burden is "to demonstrate that no genuine issue of material fact exists."[18] If the movant satisfies that initial burden by establishing the "absence of evidence to support an essential element of the non-movant's case, the burden shifts to the party opponent to establish that there is a genuine issue of material fact."[19]

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[15] The rule of automatic vacatur after a finding of mootness on appeal, best expressed in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), was rejected by the Supreme Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23-24 (1994). Instead, a vacatur, which is an "extraordinary" and equitable remedy, is to be granted only after a fact-specific balancing of the equities between the parties. *Bancorp*, 513 U.S. at 26. When, however, a party who prevailed below makes the case moot by his unilateral action, a "vacatur must be granted." *Id.* at 23.

[16] FED.R.CIV.P. 56(c); *Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005).

[17] *Condrey*, 429 F.3d at 562 (internal quotation marks omitted).

[18] *Id.*

[19] *Id.*

"An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party."[20] "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law."[21] At summary judgment, we construe facts in the light most favorable to the non-moving party.[22]

b. Merits

Sossamon seeks damages and equitable relief under RLUIPA from Texas and from the defendants in their individual and official capacities for the enforcement of the cell-restriction and the chapel-use policy against him. To address these claims, we must confront several issues that we have previously left unresolved. We must now determine (1) what, if any, private rights of action does RLUIPA create, (2) what are the limits on any such private rights of action in light of the sovereign immunity enjoyed by states, and (3) what is the interaction between the PLRA and the rights created by RLUIPA.

We begin with a preliminary observation: RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief. In 42 U.S.C. § 2000cc-2(a), Congress granted prisoners permission to "assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." No decision cited by the parties and none of which we are aware holds that RLUIPA's "appropriate relief" language fails to confer

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[20] *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam).

[21] *Id.*

[22] *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008).

an individual right to pursue declaratory and injunctive relief. We therefore address whether RLUIPA also authorizes suits for damages against (1) RLUIPA defendants in their individual capacities or (2) the state and its officers in their official capacities, or both. We address each damages question in turn before addressing Sossamon's claims for injunctive and declaratory relief.

A number of circuits appear to have assumed that an individual-capacity cause of action for damages exists because the courts have conducted, or on remand have required that the district court conduct, a qualified immunity analysis.[23] Some circuits have also reached the PLRA issue and held that, because it bars compensatory damages absent physical injury, the question about RLUIPA's remedial scope is irrelevant.[24] Of course, if no private right of action

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[23] The Ninth Circuit appears to have assumed that a cause of action for monetary relief against state actors in their individual capacities exists, but its cases contain no analysis and are unpublished. *See Campbell v. Alameida*, 295 F. App'x 130, 131 (9th Cir. 2008) (mem.) (unpublished), *Von Staich v. Hamlet*, Nos. 04-16011 & 06-17026, 2007 WL 3001726, at *2 (9th Cir. Oct. 16, 2007) (mem.) (unpublished). The Third Circuit has declined to address the issue. *Brown v. Dep't of Corr.*, 265 F. App'x 107, 111 n. 3 (3d Cir. 2008) (per curiam) (unpublished) ("We also find it unnecessary to reach the questions whether individuals may be liable for monetary damages under the RLUIPA and whether qualified immunity applies here."). The Fourth Circuit noted a split in the district courts over the issue, but did not resolve it. *Madison v. Virginia*, 474 F.3d 118, 130 n. 3 (4th Cir. 2006).

[24] *See* cases cited *supra* note 23. This is not true as a general proposition, although it appears to have been accurate for the case that held as much, i.e., the plaintiffs did not request nominal or punitive damages, which are the only damages absent physical injury that the PLRA does not bar. *See Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605-06 (5th Cir. 2008).

exists against the defendants in their individual capacities, then a qualified immunity or PLRA analysis would be unnecessary. In *Mayfield v. Texas Department of Criminal Justice*, the only case in which we have examined this issue, we appeared to countenance the idea that a cause of action exists, but then expressly declined to resolve the issue.[25] We will assume that if RLUIPA creates an action against defendants in their individual capacities, then it provides for damages.[26] For the reasons that we explain below, we decline to find any authority for individual-capacity actions in the statute.

The Eleventh Circuit is the only circuit that has resolved this issue. After acknowledging a split in the district courts, *Smith v. Allen* held that RLUIPA does not provide for damages from individuals.[27] The plain language of RLUIPA, however, seems to contemplate such relief. Despite providing a cause of action for suits against "a government," the definition of government provided by the statute is expansive.[28] The term "government" means:

(i) a State county, municipality, or other

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[25] 529 F.3d 599 at 605-06 & n 8.

[26] *See Smith v. Allen*, 502 F.3d 1255, 1272 (11th Cir. 2007). For example, the *Smith* court noted that the Supreme Court has instructed us to "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise" or given guidance by a "clear indication of its purpose with respect to remedies." *Id.* at 1270 (internal quotation marks omitted). There is no clear or express indication in RLUIPA that damages are unrecoverable.

[27] *Id.*

[28] 42 U.S.C. § 2000cc-2(a) (2006).

> governmental entity created under the authority of a State; (ii) a branch, department, agency, instrumentality, or *official of an entity* listed in [that] clause ...; and (iii) *any other person acting under color of state law*. . . .[29]

Smith acknowledged that this language appears to create a right against state actors in their individual capacities. It even mirrors the "under color of" language in § 1983, which we know creates an individual-capacity cause of action for damages.[30]

In holding that individuals may nevertheless *not* be sued for damages under RLUIPA, the Eleventh Circuit added an important gloss to a plain-language interpretation of the statute: RLUIPA was enacted pursuant to Congress's Spending Clause power, not pursuant to the Section 5 power of the Fourteenth Amendment.[31] Accordingly, only the grant recipient-the state-may be liable for its violation.[32] Spending Clause legislation is not legislation in its operation; instead, it operates like a contract,[33] and individual RLUIPA defendants are not parties to the contract in their individual capacities.

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[29] *Id.* § 2000cc-5 (emphases added).

[30] *See, e.g., Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled on other grounds by Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

[31] *See Cutter v. Wilkinson*, 544 U.S. 709, 715-16 (2005) (mentioning the Spending and Commerce Clauses); *Smith*, 502 F.3d at 1274 n. 9 (Spending Clause only).

[32] *Smith*, 502 F.3d at 1272-73.

[33] *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

We too conclude that RLUIPA, at least as Sossamon asserts a claim under it, was passed pursuant to the Spending Clause,[34] and we too follow the same rule for such legislation.[35] The legislation/contract distinction makes good sense-if a congressional enactment could provide the basis for an individual's liability based only on the agreement of

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[34] Every circuit to consider whether RLUIPA is Spending Clause legislation has concluded that it is constitutional under at least that power. *See Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006) (approving of enactment under the Spending Clause, but not passing on a Commerce Clause authority); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005) (same); *Benning v. Georgia*, 391 F.3d 1299, 1313 (11th Cir. 2004) (same); *Charles v. Verhagen*, 348 F.3d 601, 606-11 (7th Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062, 1066-70 (9th Cir. 2002) (same). Only the Eleventh Circuit has explicitly held that RLUIPA is Spending, not Commerce, Clause legislation. *Smith*, 502 F.3d at 1274 n. 9. In light of the Supreme Court's rationale for striking down the prior incarnation of RLUIPA as applied to the states, *see Cutter*, 544 U.S. at 715 (characterizing *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), the case that struck down the Religious Freedom Restoration Act ("RFRA"), as focusing on the absence of a Commerce Clause underpinning or Spending Clause limitation), we agree with the Eleventh Circuit's conclusion (and the implicit conclusion of the other circuits by their uniform choice to select the Spending Clause as the most natural source of congressional authority to pass RLUIPA) when there is no evidence concerning the effect of the substantial burden on "commerce with *foreign nations*, *among* the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2).

[35] *See Pederson v. LSU*, 213 F.3d 858, 876 (5th Cir. 2000) ("Title IX is Spending Clause legislation, and as a statute enacted under the Spending Clause, Title IX generates liability when *the recipient of federal funds* agrees to assume liability." (emphasis added) (citing *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997))). In fact, *Smith* cited *Rosa H.* as support for its conclusion. 502 F.3d at 1274.

(but not corresponding enactment of legislation by) a state, then important representation interests protected by federalism would be undermined. After passively acquiescing in the regulation of its citizens under a federal standard to receive needed funding from Congress, a state legislature could point its finger at the federal government for tying needed funds to an undesired liability-the regulation or law responsible for such liability not having been enacted by the state. Congress could reciprocate by pointing its finger at the state legislature for accepting the funds and visiting liability on its citizens by the state's own choice, even though the state itself did not enact the law or regulation in question. Such an approach blurs the lines of decisional responsibility; that, in turn, undermines the popular check on both state and federal legislatures. We therefore make explicit that which was implicit in our earlier cases: Congressional enactments pursuant to the Spending Clause do not themselves impose *direct* liability on a non-party to the contract between the state and the federal government.[36] Cases like *South Dakota v. Dole*, despite its lax approach to *indirect* legislation (such as requiring that a state itself pass a particular law) under the Spending Clause, were clearly intended to prevent--in spirit, if not by doctrine--this type of end-run around the limited powers of Congress to directly

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[36] *Cf. Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power ... rests on whether *the State* voluntarily and knowingly accept[ed] the terms of the 'contract.'" (emphasis added)). Perhaps there is an argument to be made that by accepting employment in a federally funded state enterprise, a state official becomes a third-party beneficiary to the contract, or knowingly and voluntarily subjects himself to liability. Sossamon does not make this argument.

affect individual rights.[37] To decide otherwise would create liability on the basis of a law never *enacted* by a sovereign with the power to affect the individual rights at issue. For this reason, as a matter of statutory interpretation and to avoid the constitutional concerns that an alternative reading would entail, we decline to read Congress's permission to seek "appropriate relief against a government" as permitting suits against RLUIPA defendants in their individual capacities.

Having concluded that an action under RLUIPA does not exist for individual-capacity claims, we will assume *arguendo* that an official-capacity damages action exists. Whether or not RLUIPA creates such a cause of action, it is barred by Texas's sovereign immunity. As we noted above, RLUIPA was passed pursuant to the Spending Clause. It is therefore not an attempt by Congress to *abrogate* Texas's sovereign immunity, but to goad Texas to *waive* its sovereign immunity by accepting federal funds conditioned on accepting liability.[38] We recently declined to address

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[37] 483 U.S. 203 (1987).

[38] Sossamon's supplemental brief, prepared by the counsel we appointed him, contends that Texas waived its sovereign immunity for this case by requesting attorneys' fees in its answer to the original complaint. For this proposition, the brief cites *Powell v. Texas Department of Criminal Justice*, 251 S.W.3d 783, 791 (Tex.App.-Corpus Christi 2008, pet. filed). Our waiver inquiry is limited by the Supreme Court to determining whether the state (1) expressly consented to suit in federal court, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), *superseded by statute on other grounds as stated in Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 280 n.29 (5th Cir. 2005) (en banc), or (2) waived its sovereign immunity through litigation conduct, for example, by voluntarily invoking a federal court's subject matter jurisdiction, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002). Sossamon makes no claim that a

this issue,[39] and there is a circuit split on the question. In *Benning v. Georgia*, the Eleventh Circuit concluded that a state waives its sovereign immunity by participating in RLUIPA's *quid pro quo*.[40] In *Madison v. Virginia*, the Fourth Circuit reached the opposite conclusion.[41]

When deciding the validity of a putative waiver of sovereign immunity through a state's participation in a Spending Clause "contract," we ask whether Congress spoke with sufficient clarity to put the state on notice that, to accept federal funds, the state must also accept liability for monetary damages.[42] The Eleventh Circuit did not dwell long on whether the phrase "appropriate relief" unambiguously notified Georgia that its acceptance of federal funds was conditioned on a waiver of immunity from suit, holding that it did.[43] Against a challenge that *Pennhurst State*

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request for attorneys' fees in an answer is a voluntary invocation of our subject matter jurisdiction like removal, so his *Lapides* waiver argument fails.

[39] *Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605 n.8 (5th Cir. 2008) ("However, circuit courts are currently split on whether RLUIPA provides for a waiver of state sovereign immunity.... We need not reach [that] issue[ ] to decide this appeal.").

[40] 391 F.3d 1299, 1305 (11th Cir. 2004).

[41] 474 F.3d 118, 131 (4th Cir. 2006).

[42] *See Pennhurst*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (footnote omitted)).

[43] *Benning*, 391 F.3d at 1305-06.

School & Hospital v. Halderman[44] required more specificity than the quoted language, the *Benning* court held that "[t]he federal law in *Pennhurst* was unclear as to whether the states incurred any obligations at all by accepting federal funds, but RLUIPA is clear that states incur an obligation when they accept federal funds."[45]

The Fourth Circuit, we believe properly, continued the analysis where the Eleventh left off, observing that RLUIPA clearly apprises states that they incur an obligation, to wit, amenability to some sort of suit seeking to enforce the rights RLUIPA creates; however, the question then becomes, "Which kind?" To choose between deciding whether Virginia knew that the cause of action envisioned by Congress permitted damages (which is what we read *Pennhurst* to require) or only knew that it was subjecting itself to equitable remedies, the *Madison* court turned to the rules of construction found in the Supreme Court's waiver jurisprudence. The court pointed out that any alleged waiver must be strictly construed in favor of the sovereign. Further, the waiver may not be enlarged "beyond what the language requires," and ambiguities must be resolved in favor of immunity.[46] With those principles in mind, the opinion concluded that "appropriate relief" is "subject to more than one interpretation," making the language "open-ended and equivocal."[47] This fell short of the requirement that a

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[44] 451 U.S. at 13-14.

[45] *Benning*, 391 F.3d at 1307.

[46] *Madison*, 474 F.3d at 131 (citing *Lane v. Pena*, 518 U.S. 187, 192, 196 (1996)).

[47] *Id.* at 131-32 (internal quotation marks omitted).

textual waiver of immunity must "extend unambiguously to such monetary claims."[48] For the Fourth Circuit, this meant that RLUIPA could not satisfy *Dole*'s requirement that the spending condition be unambiguous. We find the Fourth Circuit's reasoning persuasive, although we conclude that the spending provision is not sufficiently clear in light of the Court's sovereign-immunity jurisprudence, rather than, strictly speaking, under *Dole*.

The rules of construction that the Eleventh Circuit applied to resolve the ambiguities in "appropriate relief" for purposes of the cause-of-action inquiry in *Smith* disappear when we must interpret an ambiguous provision against the backdrop of a state's sovereign immunity. That is, we must presume that Congress intended to afford all ordinary remedies not *expressly disclaimed* when we interpret the ambiguous language it uses to create a cause of action.[49] We may not presume the same when we ask whether a state knowingly waived its immunity from damages when damages are not *expressly provided*. RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief.[50] Accordingly, Sossamon's

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[48] *Id.* at 131.

[49] *See Smith v. Allen*, 502 F.3d 1255, 1272 (11th Cir. 2007).

[50] *Cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67 (1989) ("This does not mean ... that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.").

claims for monetary relief from Texas and its officers in their official capacities are barred.

To briefly recap, we hold that whether or not RLUIPA creates a cause of action for damages against Texas and the defendants in their official capacities, any award of damages is barred by Texas's sovereign immunity. We also hold that RLUIPA does not create a cause of action against defendants in their individual capacities. Accordingly, we need not address Texas's PLRA argument for the RLUIPA claims.[51]

Even though Sossamon may not recover monetary damages, there are genuine issues of material fact about his entitlement to declaratory and injunctive relief from Texas's chapel-use policy.[52] RLUIPA requires that prison officials refrain from (1) substantially burdening an inmate's free exercise of his religion unless, when strictly scrutinized, (2) the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling interest."[53] The

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[51] We have conducted the predicate cause-of-action and sovereign immunity inquiries because it is unclear whether or not Sossamon abandoned on appeal his request for punitive damages. The PLRA does not bar punitive damages, so we would have been required to address these questions at least for punitive damages in any event. *See Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605-06 (5th Cir. 2008). That we reached the above conclusions for compensatory damages only strengthens the conclusion that punitive damages are (1) unavailable against RLUIPA defendants in their individual capacities and (2) barred by a state's sovereign immunity even if RLUIPA intended to permit them.

[52] As discussed above, any claims for prospective relief based on the old cell-restriction policy are moot.

[53] 42 U.S.C. § 2000cc-1(a) (2006).

initial burden is on the plaintiff "to demonstrate that the government practice complained of imposes a 'substantial burden' on his religious exercise."[54] Bearing that initial burden requires answering two questions in the affirmative: "(1) Is the burdened activity 'religious exercise,' and if so (2) is the burden 'substantial?' "[55]

Religious exercise under RLUIPA is defined very broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[56] A *burden* is *substantial* if "it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[57] A burden is not substantial if "it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed."[58]

The practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion.[59] Even though the statute by its terms does not exempt rules or regulations simply because they are generally applicable,[60] we observed in

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54 *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004).

55 *Id.*

56 *Id.*

57 *Id.* at 570.

58 *Id.*

59 *Id.*

60 42 U.S.C. § 2000cc-1(a) (2006).

Adkins v. Kaspar that the uniformity of a burden is nevertheless relevant.[61] The inquiry is a "case-by-case, fact-specific inquiry," and we have also considered whether the "rule or regulation ...*directly* prohibits" the practice.[62]

The compelling-governmental-interest issue is not in significant dispute in this case. Effective and affordable prison security at the chapel is a compelling governmental interest.[63] The phrase "least restrictive means" has its plain meaning.

Concerning the first question in our RLUIPA inquiry, *viz.*, whether the claim involves "religious activity," there can be no serious dispute that Sossamon's claimed need for access to the chapel and its symbols relates to the exercise of his religion. As for the second question, we perceive a genuine issue of material fact whether the chapel-use policy creates a substantial burden on Sossamon's free exercise.

There seems to be no question about the genuineness of Sossamon's claimed desire to appear in front of the cross and altar in a room designated for Christian worship. One of the clerical affidavits submitted by TDCJ points out that Christianity, on the chaplain's understanding of it, does not consider

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[61] *Adkins*, 393 F.3d at 571.

[62] *Id.* (emphasis added).

[63] *See Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) ("Courts should apply the compelling governmental interest standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." (internal quotation marks omitted)).

these acts basic tenets of the faith. But, the chaplain's understanding is irrelevant except to the extent that it might call into question Sossamon's good faith, which it does not purport to do. *Adkins* was quite clear that a practice need not be central to an adherent's religion, simply important. No summary judgement evidence contradicts Sossamon's claim that these religious practices are important to *his* practice of Christianity. Prison chaplains are not arbiters of the measure of religious devotion that prisoners may enjoy or the discrete way that they may practice their religion.

Texas nevertheless contends that by making alternative venues available to Sossamon, he cannot claim that denying him access to the chapel and its Christian symbols substantially burdens his religious exercise. This ignores the fact that the rituals which Sossamon claims are important *to him*-without apparent contradiction-are now completely forbidden by Texas.[64] He may go to Christian services, but none

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[64] *See Greene v. Solano County Jail*, 513 F.3d 982, 987-88 (9th Cir. 2008) (clarifying that specific practices of a religion fall within the definition of "*any* exercise of religion" in RLUIPA); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) ("[A] substantial burden to free exercise rights may exist when a prisoner's sole opportunity for group worship arises under the guidance of someone whose beliefs are significantly different from his own." (internal quotation marks omitted)). *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007), is not to the contrary. There, after a very extensive review of the prisoner's many requests for religious items, the prison denied the adherent a quartz crystal, but only after the prison granted the adherent "a Thor's hammer necklace; a candle in his cell; a fern tree; a number of religious 'runes' ... as well as permission to have a designated day of the week to practice his Odinism; and permission to recognize four Odinist holidays." *Id.* at 1277 n.13. The denial of the quartz crystal, after a back and forth on supporting documentation, is markedly different from a wholesale denial of what Sossamon

of those services satisfy *his* need to perform what are apparently important aspects of *his* free exercise of Christianity, to wit: "[K]neeling at the alter [sic] in view of the Cross, to pray ...." and the like.

In *Mayfield*, we held that denying runestones to an Odinist created a genuine issue of material fact whether the adherent's religious exercise was substantially burdened.[65] Faced with a claim that all prisoners were barred from having similar items for security reasons, the court held that "TDCJ cannot use what is effectively a compelling interest argument to answer the preceding question of whether Mayfield's religious exercise is substantially burdened."[66] So too in this case: The fact that the chapel is off limits to all congregational worship does not answer whether Sossamon's religious exercise has been substantially burdened. *Mayfield* is even stronger support for Sossamon because the *Mayfield* plaintiff was permitted to possess runestones whenever a lay volunteer was available.[67] Here, Sossamon is never permitted to engage in religious worship in the chapel, at least according to the summary-judgment evidence.

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claims is core to the practice of his Christianity, at least for summary judgment purposes.

[65] 529 F.3d 599, 615-16 (5th Cir. 2008).

[66] *Id.* at 616.

[67] We also found that genuine issues of material fact existed as to the lay-volunteer policy, which precluded Mayfield from forming a group in which to worship without a volunteer present (volunteers came very irregularly). *Id.* at 613-15, 617. Texas responded that Mayfield could worship in his cell, but could not possess all of the worship items he contended were necessary. *Id.* We found that this alternative-solo worship-was inadequate to remedy the burden. *Id.*

Perhaps the best argument in Texas's favor is that Sossamon is simply asking to enjoy some "benefit" or to act in some way "not otherwise allowed." In debunking Texas's prison-security argument, Sossamon alleges that other prisoners are allowed to use the chapel for secular purposes. Thus, when viewed in the light most favorable to Sossamon, chapel access is clearly not something that is generally disallowed or a benefit not generally possessed by prisoners at Robertson. Congregational *worship* is not generally allowed in the chapel, but the key security factor-physical *presence* in the chapel of a group of prisoners engaged in communal activity-is allowed. The fact that the policy directly responsible for this burden bars *all* such religious worship (a fact that we noted was not present in *Adkins*) hardly makes a stronger case for finding no substantial burden when substantial secular use is made of the facility at issue.

Other RLUIPA cases in this circuit have recognized that a genuine issue of material fact exists in determining whether refusing to allow a Native American to let his hair grow out creates a substantial burden on religious exercise.[68] Failure to provide kosher food may also constitute a substantial burden.[69] It is primarily cases in which the small number of available lay volunteers makes religious services less frequent than an adherent would like (but still available on a somewhat regular basis) that a neutrally applied policy does not substantially burden religious exercise.[70] In Sossamon's case, the religious

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[68] *Longoria v. Dretke*, 507 F.3d 898, 903 (5th Cir. 2007) (per curiam).

[69] *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007).

[70] *See id.* at 124-25; *Adkins*, 393 F.3d at 571.

practice that he claims is important to him is denied to him at all times, whether or not volunteers are present. Accordingly, genuine issues of material fact exist on the "substantial burden" question of RLUIPA.

If there is (or could be) a substantial burden, the second RLUIPA question requires us to answer whether the substantial burden is nevertheless justified by a compelling governmental interest achieved through the least restrictive means. Texas obviously has compelling governmental interests in the security and reasonably economical operation of its prisons, but there are genuine issues of material fact as to whether vis-à-vis the chapel it has furthered those interests through the least restrictive means possible. Sossamon produced competent summary-judgment evidence which, when viewed in the light most favorable to him, reveals that the chapel can be and is safely used for other kinds of prisoner gatherings, such as weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates. Texas contends that because Sossamon is allowed to attend religious services elsewhere, it has adopted the least restrictive means of accommodating his religious beliefs because Texas has not banned Christian worship entirely.[71]

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[71] Even this argument fails. For example, Texas could provide a portable altar and a portable set of Christian furnishings that could be used for worship in one of the rooms where congregational services are held. Whether that would satisfy Sossamon is uncertain; he does seem to contend that services in the chapel itself, which to him is God's house, are necessary. Still, providing a portable altar and Christian symbols at the alternative worship venues would restrict his religious exercise less.

This misses the point. Odinist worship was not banned in *Mayfield* either; the prison simply made inadequate accommodations for it. Yet we found a genuine issue of material fact existed as to whether the prison had furthered a compelling governmental interest by the least restrictive means. In contrast, Texas *has* banned the kind of Christian worship Sossamon contends is indispensable to the exercise of *his* Christianity—*kneeling* in front of the cross and such. Yet in its brief, Texas does not even engage the issue of other groups of prisoners using the chapel. We cannot say that there are no genuine issues of material fact about how prison security might be furthered by the chapel-use policy when Texas essentially asks us to accept the conclusional assertion that a worship service presents significantly more danger than a sexed class.

Neither can we see why many of the security concerns voiced by Texas cannot be met by using less restrictive means, even taking into account cost. For instance, shifts of prisoners, segregated by building, could be permitted to worship in the chapel, which would obviate concerns about the mixing of rival gangs and seating capacity. Services might be limited to days when fewer administrative personnel are in the main building (say, on Sundays), which should lessen the risk to non-security personnel of a riot and the strain of frequent prisoner movements. Some of these options might not prove feasible, and there might be as-yet-unarticulated reasons why Texas must ban worship services in the chapel while nevertheless using it for other prisoner gatherings (or that it in fact does not).[72]

[72] Perhaps only prisoners unlikely to create a security concern are permitted in these other gatherings, if the other

Those issues may be further developed on remand.

Concluding that there are genuine issues of material fact in both steps of the strict-scrutiny analysis that RLUIPA instructs us to apply, we reverse the grant of summary judgment in favor of Texas on this claim and remand for further proceedings consistent with this opinion.

3. Section 1983 Claims

a. Standard of Review

As with the RLUIPA claims, we review the district court's grant of summary judgment on these claims *de novo*, applying the same standards as the district court and construing the evidence in the light most favorable to the non-moving party.[73]

b. Merits

Sossamon's First Amendment claim is, as a practical matter, only relevant in this appeal to his individual-capacity-damages claims under § 1983.[74] RLUIPA, by directing that we apply strict scrutiny, makes injunctive relief easier for Sossamon to obtain than it would be under the First Amendment. In *Turner v. Safley*, which provides the standard for establishing a First Amendment violation in the prison context, the Supreme Court held that so long as actions are "reasonably related to legitimate

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gatherings in fact happen. This would be no excuse for failing to permit such low-risk prisoners from using the chapel for worship as well.

[73] *Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005).

[74] Section 1983 does not provide a cause of action against states or state employees in their official capacities for damages. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67 (1989).

penological interests,"[75] they are constitutional. That is an easier showing for Texas to make than that its actions pass strict scrutiny. We also perceive no remedial differences between RLUIPA and the Constitution for purposes of an injunction. But, for the same reasons that summary judgment was improper on Sossamon's claims for injunctive and declaratory relief under RLUIPA, we perceive that there are genuine issues of material fact going to the reasonableness of Texas's conduct under even the laxer First Amendment standard. Should the distinction between the two causes of action become important going forward, the district court is free in the first instance to assess anew, after further proceedings, whether the chapel-use policy states a First Amendment violation.

As for the individual-capacity claims for damages under the First Amendment, we note that the defendants who Sossamon sued enjoy qualified immunity as government actors.[76] Whether Sossamon could establish a violation of the First Amendment in addition to RLUIPA is not a question that we resolve today. Instead, we simply note that Sossamon has pointed to no cases that render the defendants' actions-under either the cell-restriction policy or the chapel-use policy-unreasonable in light of clearly established federal law. We therefore affirm on that

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[75] 482 U.S. 78, 89 (1987).

[76] *See Behrens v. Pelletier*, 516 U.S. 299, 305-06 (1996) ("[T]he qualified immunity defense shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal quotation marks omitted) (alterations in original)).

basis the grant of summary judgment in favor of the individual defendants for the First Amendment claims.

Although barely briefed on appeal, Sossamon also claims that the provision of special food and religious accommodations to Muslim prisoners violates the Equal Protection Clause. But, for such a claim to succeed, Sossamon must prove "purposeful discrimination resulting in a discriminatory effect among persons similarly situated."[77] *Turner* applies in the equal protection context, and not "every religious sect or group within a prison-however few in numbers-must have identical facilities or personnel."[78]

Other than alleging that Muslim prisoners receive special meals and religious accommodations (requests for which are handled under a consent decree entered into for past discrimination against them),[79] Sossamon has marshaled absolutely no evidence in support of his equal protection claim. Even without the consent decree as an explanation, he fails to allege anything but the "bald, unsupported, conclusional allegations that defendants purposefully discriminated against him" that we found inadequate in *Adkins*.[80] These claims are without merit, so summary judgment in favor of the defendants was proper.

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[77] *Adkins v. Kaspar*, 393 F.3d 559, 566 (5th Cir. 2004) (internal quotation marks omitted).

[78] *Id.*

[79] *See Brown v. Beto*, No. 4:74-CV-069 (S.D.Tex. 1977).

[80] 393 F.3d at 566.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment to Texas and the other defendants on Sossamon's RLUIPA and First Amendment claims for declaratory and injunctive relief arising out of the chapel-use policy and REMAND for further proceedings consistent with this opinion. We DISMISS AS MOOT so much of the appeal as relates to Sossamon's claims for injunctive and declaratory relief based on the cell-restriction policy with instructions that the district court VACATE those portions of its opinion as well. Otherwise, we AFFIRM the grant of summary judgment in favor of Texas and the defendants in their official and individual capacities on all (1) claims under TRFRA, the Eighth Amendment, and the Fourteenth Amendment; (2) all claims for damages under the First Amendment; (3) and all claims for damages under RLUIPA.

DISMISSED AS MOOT IN PART; REVERSED IN PART; AFFIRMED IN PART; REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

HARVEY LEROY SOSSAMON III
#1120297

V.

THE LONE STAR STATE OF TEXAS,
CHRISTINA MELTON CRAIN,
CATHY CLEMENT,
BRAD LIVINGSTON, DOUG DRETKE,
REV. R.C. MURPHY, ROBERT EASON,
STACY L. JACKSON, and
PAUL J. KLIEN

A-06-CA-003-SS

ORDER

Before the Court are Plaintiff's complaint brought pursuant to 42 U. S. C. § 1983 (Document No.1); Plaintiff's Motion for Partial Summary Judgment (Document No. 23); Defendants' Partial Motion to Dismiss (Document No. 28); Defendants' Motion for Summary Judgment (Document No. 29); Plaintiff's response thereto (Document No. 33); Plaintiff's Motion for Dismissal Under the Texas Religious Freedom Act, Against the Defendants in their Personal and Individual Capacities (Document No. 43); and Plaintiff's Motion for Partial Dismissal and Withdrawal to Amend the Original Complaint

(Document No. 48). Plaintiff, proceeding pro se, has been granted leave to proceed in forma pauperis.

I. BACKGROUND

At the time he filed his complaint, Plaintiff was an inmate incarcerated in the Robertson Unit of the Texas Department of Criminal Justice - Correctional Institutions Division. Plaintiff files this action pursuant to the Civil Rights Act, 42 U.S.C. § 1983; the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc through § 2000cc-5; and the Texas Religious Freedom Act ("TRFA"), TEX. CIV. PRAC. & REM. Code Chapter 110. Plaintiff alleges Defendants have violated his rights under the First, Eighth, and Fourteenth Amendments, RLUIPA and TRFA by denying him the opportunity to participate in congregational Christian services: (1) in the chapel at the Robertson Unit; and (2) while on cell restriction at the Robertson Unit. Plaintiff seeks declaratory, injunctive and compensatory relief. He sues the Lone Star State of Texas, Christina Melton Crain (Chairperson of the Texas Board of Criminal Justice), Cathy Clement (Assistant Regional Director for Region VI of TDCJ), Brad Livingston (Executive Director of TDCJ), Doug Dretke (former Director of the Correctional Institutions Division of TDCJ), Reverend R.G. Murphy (Region V Program Administrator for the Chaplaincy Department, Rehabilitation and Reentry Programs Director of TDCJ), Robert Eason (Senior Warden at the Robertson Unit), Stacy Jackson (Assistant Warden at the Robertson Unit), and Paul J. Klien (Volunteer Chaplain at the Robertson Unit). Plaintiff sues the defendants in their individual and official capacities.

Plaintiff was granted leave to amend his complaint. Subsequently, Plaintiff informed the Court

he would not be able to meet the deadline for amending his complaint and requested his request to amend be withdrawn. Plaintiff further requested the Court to go forward with its decisions in this case based on his original complaint. However, Plaintiff moved the Court to dismiss his claims brought pursuant to the TRFA against the defendants in their individual capacities. He further moved the Court to dismiss his claims brought against Defendants Murphy, Jackson and Klien. Plaintiff's requests to dismiss will be granted.

In his original complaint Plaintiff alleges inmates are denied total access to the prison chapel at the Robertson Unit for purposes of religious expression. He further claims Plaintiff and religious inmates wanting access to the chapel are victims of discrimination. Plaintiff explains prison officials allow inmates access to the chapel for non-religious purposes. Plaintiff contends Defendants have exaggerated the need for security in the chapel. Plaintiff complains Defendants have evicted God out of His house and reduced Christian worship services to attendance inside a multi-purpose room. According to Plaintiff, the multi-purpose rooms contain no traditional Christian symbols or furnishings. Plaintiff further asserts their services or Bible studies are often interrupted by security personnel or loud yelling just outside the window to the room. Plaintiff also claims inmates are retaliated against and harassed by security personnel if an inmate worker does not stop worshiping and report to work as ordered. Plaintiff claims the retaliation and harassment may consist of a strip search. However, Plaintiff does not allege he has personally been subjected to a strip search for failing

to report to work, and he did not raise this issue in his prison grievances.

Plaintiff further alleges Christians are discriminated against at the Robertson Unit because they are not provided special accommodations to hold religious ceremonies and do the necessary rituals in the chapel or any other sanctified place for Easter week and the Sunday service unlike Muslims, who receive special accommodations during Ramadan and other Muslim holy days. Plaintiff further complains there are no special meals for Christians to observe any religious holy day or period.

Plaintiff contends Defendants have subjected him to cruel and unusual punishment by causing him spiritual, mental, emotional and physical pain. Plaintiff explains this punishment was caused by denying him the most basic opportunities to express and practice his Christian faith inside the prison sanctuary. Plaintiff asserts he was forced to accept and witness the eviction of God from the chapel and the reducing of God to a time-share deity with anger management prisoners in the multi-purpose room empty of any Christian symbols or furnishings.

In addition to being denied access to the chapel, Plaintiff alleges inmates subjected to cell restrictions as a result of a disciplinary violation are not allowed to attend church services. According to Plaintiff, prisoners are allowed to leave their cells while on cell restriction for many other purposes including going to work, eat, shower, medical lay-ins, educational classes, the law library and other secular activities.

According to Plaintiff, on September 15, 2005, Plaintiff was found guilty of a minor rule infraction. As result, he received 15 days cell restriction and 15 days

loss of commissary privileges. Because of the cell restriction, he was denied permission to attend religious services on September 18, 2005, and September 25, 2005. Plaintiff grieved the issue, and was told by Warden Eason that he would look into the cell restriction policy.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment arguing TDCJ's policies concerning religious practices are reasonably related to legitimate penological interests - safety and security - and do not violate Plaintiffs constitutional rights. Defendants contend the policies are justified by compelling state interests and there is no other way, let alone a less restrictive way, to balance TDCJ's accommodation of religions with the need to ensure the safety and security of offenders and correctional personnel.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for partial summary judgment seeking summary judgment on his claims arising from the cell restriction policy and the denial of access to the chapel.

IV. ANALYSIS

A. Standard of Review Under Fed. R. Civ. P. 56(c)

A court will, on a motion for summary judgment, render judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Int'l Shortstop, Inc. v. Rally Inc.*, 939 F.2d 1257,1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S. Ct. 936 (1992). When a motion for summary

judgment is made and supported, an adverse party may not rest upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429,433 (5th Cir. 1995); FED. R. CIV. P. 56.

Both movants and non-movants bear burdens of proof in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317,106 S. Ct. 2548 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense. Id. at 322, 106 S. Ct. at 2552. In so doing, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. *Id* at 323-24, 106 S. Ct. at 2554. At that point, the burden shifts to the non-moving party to "produce evidence in support of its claims or affirmative defenses . . . designating specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S. Ct. at 2553. The non-moving party must produce "specific facts" showing a genuine issue for trial, not mere general allegations. FED. R. CIV. P. 56(e); *Tubacex v. M/V Risan*, 45 F.3d 951,954 (5th Cir. 1995).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing Matsushita, 475 U.S. at 586, 106 S. Ct.

1356)). To the extent facts are undisputed, a Court may resolve the case as a matter of law. *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir. 1994).

B. Eleventh Amendment Immunity

Plaintiff's claims for monetary damages against the State of Texas and the defendants sued in their official capacities are barred under the Eleventh Amendment because such an action is the same as a suit against the sovereign. *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868, 1871 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (1994). This includes Plaintiff's request for monetary damages under RLUIPA.

RLUIPA does not contemplate recovering damages from individuals, such as the defendants. Instead, RLUIPA provides for "appropriate relief against a government." 42 U.S.C. § 2000cc-2a. The remedies provided in RLUIPA are complete and omit any mention of damages. The Eastern District of Texas has noted it is unclear whether RLUIPA authorizes damages in addition to injunctive relief. *Gooden v. Crain*, 405 F. Supp. 2d 714,723 (E.D. Tex. 2005). The Middle District of Alabama and the Northern District of Illinois likewise have noted it was unclear whether damages are available. *Smith v. Haley*, 401 F. Supp. 2d 1240, 1245-47 (M.D. Ala. 2005); *Agrawal v. Briley*,

No. 02-C-6807, 2003 WL 164225 at *2 n.2 (N.D. Ill. Jan. 22, 2003). However, other district courts disagree. *See Shidler v. Moore*, 409 F. Supp. 2d 1060, 1071 (N.D. Ind. 2006) (recognizing RLUIPA claims for individual money damages), *Charles v. Verhagen*, 220 F. Supp. 2d 937, 953 (W.D. Wis. 2002) (same), and *Orafan v. Goord*, No. 00CV2022, 2003 WL 21972735, at *9 (N.D.N.Y. Aug. 11, 2003) (same).

Even if monetary damages are available under RLUIPA, damages are not recoverable from the State or the defendants in their official capacities because a state's Eleventh Amendment immunity from suit for damages is not waived in RLUIPA. The Fourth Circuit in a well-reasoned and thorough opinion recently concluded RLUIPA's "appropriate relief against a government" language falls short of the unequivocal textual expression necessary to waive state immunity from suits for damages. *See Madison v. Commonwealth of Va.*, 474 F.3d 118 (4th Cir. 2006). Similarly, in *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006), the D.C. Circuit recently held RFRA's identical "appropriate relief" provision insufficient to waive federal sovereign immunity for damages suits. Accordingly, Plaintiff's claims for monetary damages against the State and the defendants in their official capacities are barred by Eleventh Amendment immunity.

C. Qualified Immunity

The defendants in their individual capacities assert their entitlement to qualified immunity with respect to Plaintiff's claims brought against them for monetary damages. The doctrine of qualified immunity affords protection against individual liability for civil damages to officials "insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). Immunity in this sense means immunity from suit, not merely from liability. *Jackson v. City of Beaumont*, 958 F.2d 616 (5th Cir. 1992). "Qualified immunity is designed to shield from civil liability all but the plainly incompetent or those who violate the law." *Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995). In general, "qualified immunity represents the norm." *Id.* With respect to a ruling on qualified immunity, the first question a court should address is "whether the plaintiff has alleged a violation of a clearly established constitutional right." *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789 (1991); *Hale v. Townley*, 45 F.3d 914, 917 (5th Cir. 1995). If the Plaintiff has alleged a constitutional violation, the court must then determine whether the defendant's conduct was objectively reasonable under legal principles as they existed at the time of the defendant's acts or omissions. *Hale*, 45 F.3d at 917, citing *Brewer v. Wilkinson*, 3 F.3d 816, 820 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123, 114 S. Ct. 1081 (1994); *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).

Claims of qualified immunity require a two step analysis. As a threshold matter, the court must consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001); *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001). If the allegations do not establish the violation of a constitutional right, the official is entitled to qualified immunity. *Saucier*, 533

U.S. at 201, 121 S. Ct. at 2156. If the allegations could make out a constitutional violation, the court must ask whether the right was clearly established--that is, whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S. Ct. at 2156. If an official makes a reasonable mistake as to what the law requires, the officer is entitled to immunity. *Id.* at 205, 121 S. Ct. at 2158. As explained below, Plaintiff has failed to establish a violation of his rights. Accordingly, the defendants sued in their individual capacities for monetary damages are entitled to qualified immunity.

D. First Amendment Claims

Plaintiff complains the defendants violated his right to religious freedom by: (1) denying him access to the chapel and (2) denying him access to religious services while on cell restriction.

The Constitution requires an inmate be given a reasonable opportunity to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments. *Cruz v. Beto*, 405 U.S. 319,322, 92 S. Ct. 1079 (1972). An inmate retains his First Amendment right to the free exercise of his religion, subject to reasonable restrictions and limitations necessitated by penological goals. *Turner v. Safley*, 482 U.S. 78, 89-91,107 S. Ct. 2254 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50, 107 S. Ct. 2400 (1987). Prison officials have a duty to accommodate an inmate's religious beliefs unless there is a legitimate penological interest which prevents such accommodation. *Eason v. Thaler*, 14 F.3d 8, 10 (5th Cir. 1994). If a prison regulation impinges on an inmate's First Amendment rights, the regulation is valid only if it is reasonably related to a legitimate

penological interest. *Turner*, 482 U.S. at 87. If the court is reviewing action taken by prison officials rather than a regulation, the same standard is applicable to determine whether the prison official's act is constitutionally permissible. *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989).

In determining whether a regulation or policy is a valid restriction reasonably related to a legitimate penological interest, the Court considers the following factors:

> (1) whether there exists a valid, rational connection between a restriction and the governmental interest invoked to justify it;
>
> (2) the availability of an alternative means to exercise the restricted right;
>
> (3) the impact on guards, other inmates, and the allocation of prison resources that would result from accommodating the asserted right; and
>
> (4) whether there are ready alternatives to the restriction.

Turner, 482 U.S. at 89-91; *Adkins v. Kaspar*, 393 F.3d 559, 564 (5th Cir. 2004).

In support of summary judgment, Defendants present the following affidavit testimony of Bill Pierce, Director of the TDCJ Chaplaincy Department:

> TDCJ Executive Directive ED-07.29, Religious Policy Statement, mandates that we extend to all offenders as much freedom and opportunity as possible for pursuing individual beliefs and practices, consistent with agency security, safety, order, arid rehabilitation concerns. TDCJ provides many opportunities through which an

> offender may exercise his faith and grow spiritually. Policies concerning religious programming are contained in TDCJ Administrative Directive AD - 07030, "Procedures for Religious Programming."

Defendants also present the following affidavit testimony of Chaplain Archie Scarbrough:

> TDCJ recognizes the significance of purposeful religious ceremony as an important component of numerous religions and tries to provide offenders reasonable opportunities to observe or participate in religious ceremonies consistent with the reasonable constraints of sound penological practices. The extent and frequency for observance of any religious ceremony is determined by consideration of several factors, including the significance of the ceremony, the availability of appropriate supervision, time and space requirement, and the security concerns of the facility. Congregational religious services, activities and meetings are governed by unit or facility rules, regulations, and policies with regard to staff and volunteer safety, security and orderly conditions of the unit, and with regard to offender conduct. Factors considered in scheduling religious activities include staff supervision requirements, unit and individual security concerns as set forth in agency policy, and the availability of TDCJ approved religious program volunteers to assist.

Chaplain Scarborough acknowledges the chapel

at the Robertson Unit may not be used for religious purposes. He states:

> As a result of this prohibition, we conduct over fifty religious programs each month in the buildings used to house offenders. I should point out at this point that it is not a basic tenant of the Christian faith that services must be held in particular locations. I should also point out that if we conducted all our religious programs in the chapel, we would not be able to afford offenders the many activities we now provide to them in the buildings where they live.

Chaplain Scarborough provided a schedule for a typical week of services in the building in which Plaintiff is housed. Included in the schedule is over 25 hours of Christian (non-Catholic) programs and services. In addition, Chaplain Scarborough explains TDCJ allows all offenders to worship according to their faith preference in their cells using allowed items such as sacred texts, devotional items, and materials. Chaplain Scarborough concludes TDCJ provides a wide variety of materials, programs, services, and activities developed to meet the spiritual needs of offenders.

In further support of their Motion for Summary Judgment Defendants also present the following affidavit testimony of Senior Warden Eason:

> Allowing offenders from all the buildings to gather together for congregational religious services at the chapel or another meeting place would defeat our efforts to keep hostile gang members apart. Further, movements of offenders from one area of the prison to

another create the greatest security risks for the staff. You always want to retain control and keep inmates in small groups so all group movements must be properly supervised. Taking into account the personnel shortages and lack of experienced staff at the Robertson Unit, it is important to the security of the unit to keep movements to a minimum.

Further, the chapel at the Robertson Unit measures approximately 30 by 36 feet and can accommodate approximately 75 people. It is not large enough to hold all the offenders who routinely attend Christian (non[-R]oman Catholic) services.

* * *

As a result of these safety and security concerns—gang activities; unnecessary offender movements; chapel size, location, and design; and the riot at the McConnell Unit—we do not use the chapel at the Robertson Unit for any religious services. We use the room as a library for religious books, as a meeting place for the staff, and as a teleconferencing facility.

With respect to the cell restriction policy, Warden Eason states he directed that beginning in October 2005, cell restrictions would not be imposed on offenders at the custody level held by Plaintiff. Warden Eason explains his personal experience is that the only real effect of cell restrictions is that offenders cannot participate in church services. He opines, if offenders need to be restricted to their cells, then their custody level should be changed to a more restrictive level.

The Fifth Circuit has upheld the constitutionality

of TDCJ's religious accommodation policy as rationally related to legitimate governmental interests. *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854 (5th Cir. 2004). The Fifth Circuit specifically held prison staff and space limitations, as well as financial burdens, are valid penological interests. *Id.* at 861.

Based on the summary judgment record before it, the Court finds TDCJ's accommodation policies and practices as set forth in these affidavits satisfy the Turner factors as to Plaintiffs complaints. The pertinent question is not whether Plaintiff has been denied specific religious accommodations, but whether, more broadly, the prison affords him opportunities to exercise his faith. *Freeman*, 369 F.3d at 861. Plaintiff does not assert Defendants denied or restricted his right to practice his religion in his cell while on cell restriction, or he had no other alternative means of practicing his religious faith. Plaintiff also does not assert Defendants fail to provide numerous alternative opportunities to worship together in their housing areas. Nor has he pointed to some obvious regulatory alternative that fully accommodates his asserted rights while not imposing more than a de minimis cost to TDCJ's valid penological goal of maintaining prison security and discipline and remaining within its financial, personnel, and space restraints, and nondiscriminatory policy. In sum, Plaintiff shows no violation of his free exercise rights.

E. Eight Amendment Claims

Plaintiff contends the denial of religious services in the chapel has subjected him to cruel and unusual punishment. The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is settled that "the treatment a

prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1976 (1994) (citations omitted). The Eighth Amendment imposes duties on prison officials to provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "take reasonable measures to guarantee the safety of the inmates." *Id.* Being denied access to the prison chapel and missing two Sunday services due to cell restrictions do not amount to violations of the Eighth Amendment.

F. Fourteenth Amendment Claims

Plaintiff claims Defendants violated his equal protection rights by (1) allowing other inmates to use the chapel for non-religious purposes and (2) allowing Muslim inmates special privileges with respect to their religion.

To maintain his claims for violation of equal protection under the Fourteenth Amendment, Plaintiff must allege and prove purposeful discrimination by Defendants resulting in a discriminatory effect among persons similarly situated. *See Muhammad v. Lynaugh*, 966 F.2d 901, 903 (5th Cir. 1992). The Fourteenth Amendment does not demand that every religious sect or group within a prison, however few in numbers, must have identical prison facilities or personnel. *Freeman*, 369 F.3d at 862. Rather, prison administrators must provide inmates with reasonable opportunities to exercise their religious freedoms. *Id.* at 863.

The fact that TDCJ's religious accommodation and related policies and regulations adversely impact

Plaintiff and his religious practices does not, by itself, establish a Fourteenth Amendment violation. "[D]isparate impact, alone, cannot suffice to state an Equal Protection violation; otherwise, any law could be challenged on Equal Protection grounds by whomever it has negatively impacted." *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997) (emphasis in original). To maintain an equal protection claim, Plaintiff must allege and prove he received treatment different from that received by similarly situated individuals and the unequal treatment stemmed from a discriminatory intent. *Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001).

Plaintiff complains Defendants do not allow any religious services in the chapel. He does not claim Defendants allowed some religious groups to congregate in the chapel while his religious group was not. That the chapel is used for non-religious purposes does not establish an equal protection claim. To state a claim under the Equal Protection Clause, a plaintiff must allege that similarly situated individuals have been treated differently. *Yates v. Stalder*, 217 F.3d 332, 334 (5th Cir. 2000). The inquiry focuses on whether the plaintiff is similarly situated to another group for purposes of the challenged governmental action. *Yates*, 217 F.3d at 334. The summary judgment evidence clearly shows TDCJ does not allow any religious services in the chapel.

Discriminatory purpose in an equal protection context implies the decision maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group. *Johnson v. Rodriguez*, 110 F.3d at 306. Plaintiff does not present any summary judgment evidence that TDCJ's refusal to

hold religious services in the chapel is intended to discriminate against inmates of one religious faith or another. Defendants' evidence, on the other hand, demonstrates that TDCJ's refusal to hold religious services in the chapel is based on space limitations and security concerns.

This same reasoning holds against Plaintiffs claims regarding cell restrictions. Plaintiff provides no summary judgment evidence of "purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Adkins*, 393 F.3d at 566. Cell restrictions apply to all faiths.

Plaintiff also complains Muslim inmates receive special privileges such as diet. Certain religious rights of TDCJ Muslim inmates are governed by a consent decree entered in *Brown v. Beto*, No. 4:74-CV-069 (S.D. Tex.1977). *See Adkins*, 393 F.3d at 566 (noting that all religious groups, except Muslims, must have a volunteer present, and that members of the Yahweh Evangelical Assembly ("YEA") were not denied equal protection when required to have a volunteer or church elder present at all meetings). Moreover, Plaintiff does not allege Christians require a special diet as part of their religion.

G. RLUIPA and TRFA

The RLUIPA, codified at 42 U.S.C. § 2000cc, provides in pertinent part as follows:

> § 2000cc-1. Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general

> applicability, unless the government demonstrates that imposition of the burden on that person-
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

An almost identical provision appears in TRFA. *See* TEX. CIV. PRAC. & REM. CODE Ann. § 110.003(a) & (b) (Vernon 2005). Both statutes prohibit the State from imposing a "substantial burden" on the practice of religious faith. A "religious exercise" for purposes of the RLUIPA includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The Supreme Court recently made it clear that under RLUIPA, accommodation of religious observances is not elevated over a prison's need to maintain order and safety. *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 2122 (2005).

The Fifth Circuit has determined that governmental action or regulation creates a "substantial burden" on a religious exercise if it "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins*, 393 F.3d at 570. A governmental action or regulation does not rise to the level of a substantial burden on religious freedom if it "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.*

In this case, Plaintiff fails to present prima facie evidence that Defendants have "substantially

burdened" the practice of his religion by refusing to use the chapel for religious services. That Plaintiff's religious group must use classroom facilities for religious services does not create a substantial burden on Plaintiff's religious practices. The summary judgment evidence shows numerous hours of religious services and instruction are provided to inmates sharing Plaintiff's faith. Moreover, it is clear from the summary judgment evidence that Defendants provide access to religious books and materials to its prisoners for the practice of their faith.

Plaintiff also has not presented any prima facie evidence that Defendants have "substantially burdened" the practice of his religion by not allowing Plaintiff to attend religious services during his cell restriction for 15 days. Plaintiff properly grieved the issue, and as a result, Warden Eason directed that beginning in October 2005, cell restrictions would not be imposed on offenders at the custody level held by Plaintiff. In this instance, the prison grievance system provided Plaintiff the relief he sought.

Alternatively, even assuming Plaintiff were to establish these instances as substantial burdens on the practice of his religion, Defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests. Defendants have shown, and Plaintiff has not shown to the contrary, that Defendants' regulations and policies are the least restrictive means of furthering those compelling governmental interests. *See Adkins*, 393 F.3d at 567-68. As the Supreme Court noted in *Cutter*, "Should inmate requests for religious accommodations become

excessive, impose unjustified burden on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition." 125 S. Ct. at 2125. No RLUIPA or TRFA violations have been shown.

IV. CONCLUSION

Accordingly, Defendants are entitled to summary judgment.[1]

It is therefore **ORDERED** that the Motion for Dismissal Under the Texas Religious Freedom Act, Against the Defendants in their Personal and Individual Capacities [#43], filed by Plaintiff on July 21, 2006, is **GRANTED**.

It is further **ORDERED** that Plaintiffs claims brought pursuant to the Texas Religious Freedom Act against the defendants in their individual capacities are **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that the Motion for Partial Dismissal and Withdrawal to Amend Original Complaint [#48], filed by Plaintiff on August 24, 2006, is **GRANTED**.

It is further **ORDERED** that Plaintiff's claims brought against Defendants Murphy, Jackson and Klien are **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that the Partial Motion to Dismiss [#28], filed by Defendants on April 6, 2006, is **GRANTED**.

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[1] The Court also notes to the extent Plaintiff seeks injunctive relief under the TRFA, a federal court does not have jurisdiction to enjoin the defendants based on state law. *See Earles v. State Bd. of Certified Publ. Accountants of La.*, 139 F.3d 1033, 1039 (5th Cir. 1998).

It is further **ORDERED** that Plaintiffs claims brought pursuant to 42 U.S.C. § 1983 and RLUIPA against the State of Texas and the defendants in their official capacities for monetary damages are **DISMISSED WITHOUT PREJUDICE** as barred by the Eleventh Amendment.

It is further **ORDERED** that the Motion for Partial Summary Judgment [#23], filed by Plaintiff on March 14, 2006, is **DENIED.**

It is further **ORDERED** that the Motion for Summary Judgment [#29], filed by Defendants on April 6, 2006, is **GRANTED** with respect to Plaintiffs remaining claims.

It is further **ORDERED** that all remaining pending motions are **DISMISSED AS MOOT.**

SIGNED this 27th day of March, 2007.

/s/

SAM SPARKS

UNITED STATES DISTRICT JUDGE

OPPOSITION BRIEF

No. 08-1438

Supreme Court, U.S.
FILED
JUL 22 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

DAVID S. MORALES
Deputy Attorney General
for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
(512) 936-1700

QUESTIONS PRESENTED

Under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, Congress invoked its spending power to authorize suits for "appropriate relief" against a "government" violating RLUIPA's substantive conditions after receiving "Federal financial assistance" of any kind, *see id.* §§ 2000cc-1(b)(1), 2000cc-2(a).

The questions presented are:

1. Whether RLUIPA's reference to "appropriate relief"—without any textual hint of what relief is indeed "appropriate"—is sufficient to unmistakably show that Congress conditioned the disbursement of federal funds on States waiving their sovereign immunity not only for equitable relief but also for money damages.

2. Whether RLUIPA's definition of "government" should be construed to authorize personal-capacity suits seeking damages from individuals who did not receive any federal funds and whose actions otherwise fall entirely beyond the reach of Congress's enumerated regulatory powers.

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REASONS FOR DENYING THE PETITION

Petitioner frames his petition as presenting a single question, but that is wrong. The petition presents two questions, not one. The first—asking whether States waived their immunity from damages actions—implicates only an exceedingly narrow circuit conflict. Indeed, five courts of appeals—four in the RLUIPA context and one addressing the same "appropriate relief" phrase in the Religious Freedom Restoration Act—have found this language insufficient to waive an entity's sovereign immunity for money damages. Only the Eleventh Circuit has held otherwise, and it did so before the Fifth, Sixth, and Seventh Circuits confronted the question. Given that these courts each explicitly rejected the Eleventh Circuit's approach, there is good reason to believe, once the Eleventh Circuit has an opportunity to revisit the question, that this shallow conflict will resolve itself.

In any event, this narrow conflict is particularly meaningless in this case: petitioner would not even prevail under the standard the Eleventh Circuit has adopted. Because that court found, in this factual context, that the Prison Litigation Reform Act barred any damages RLUIPA otherwise allowed, petitioner would face the same outcome even had his lawsuit arisen in the Eleventh Circuit.

The second question presented—asking if Congress intended the statutory term "government" to include individual employees—does not implicate any genuine split at all. That alone is sufficient to disqualify this

important statutory question from review at this time. In any event, petitioner's reading of RLUIPA would create a "novel" and "unprecedented" act of federal regulatory power. Under the theory that petitioner advances, Congress can expand its regulatory power under Article I (and undercut the federalism limits on our dual system of government) by imposing its own regulations in areas otherwise beyond its reach—so long as Congress can find any person, public or private, willing to accept federal funds *and bind a third party* to the corresponding conditions. The Spending Clause, to be sure, is not restricted to its bare terms; Congress is free to attach conditions that are necessary and proper—but they must be *proper*, and a condition that expands federal power beyond the structural checks in the Constitution is demonstrably not that.

Given that this petition arises in an interlocutory posture, that petitioner's request for relief would fail on other grounds even were he to prevail here, and that the Fifth Circuit correctly resolved this matter on the merits, further review is not warranted. The petition should be denied.

I. For a Variety of Reasons—Including Its Interlocutory Posture—This Case Is a Poor Vehicle for Resolving the Questions Presented.

This case suffers from at least four substantial vehicle problems. Each casts real doubt on the likelihood that the Court's resolution of these serious constitutional and statutory issues will have any effect on the ultimate outcome of this proceeding. Because issues of this magnitude should be resolved in a

concrete dispute where the answer will not prove almost certainly academic, the petition should be denied.

A. The case arises in an interlocutory posture, a sufficient reason alone for denying the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of final judgment "alone furnishe[s] sufficient ground" for denying certiorari); *see also VMI v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (explaining that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

There is no compelling basis for departing from this Court's traditional practice of reviewing cases after final judgment, not before. Petitioner has not yet proven that he has a viable claim, much less one entitling him to damages. Indeed, the district court *rejected* his RLUIPA claims on the merits, *see* Pet. App. 53a-56a; the Fifth Circuit, in turn, declared one moot while acknowledging it might not have succeeded anyway, *id.* at 12a, and remanded the second in light of a material factual dispute, *id.* at 31a-32a. Because petitioner might still lose even if he prevails on the points raised in this petition, the Court's resolution of these questions at this juncture might prove wholly academic in the context of this case. The Court should await a vehicle presenting *proven* (not hypothetical) claims in a *final* (not interlocutory) posture so that the Court's decision will be outcome-determinative—and not simply contingent on the result of further proceedings on remand. *See Brotherhood of Locomotive*

Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," rendering it "not yet ripe for review by this Court").

To be sure, because the Fifth Circuit did dismiss one of petitioner's claims as moot (Pet. App. 12a), petitioner will have to raise the damages issue again after final judgment in order to proceed any further on that claim. But the slight inconvenience for this single petitioner on that single claim does not warrant abandoning this Court's traditional and sound practice of refusing to hear interlocutory appeals in all but the most unusual and compelling circumstances. *See, e.g.*, Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). Petitioner can raise the same questions afresh after final judgment in a new petition, thereby presenting a fully developed factual record and allowing additional time for the issues to percolate among the lower courts. If he in fact prevails on the merits, and if at that point other courts have reached opposite conclusions after squarely addressing the questions presented in a meaningful way, review in this Court might indeed be appropriate. It is not, however, appropriate for this case at this time.

B. The Court's review would prove academic in this case for another reason: the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e), stands as an independent bar to any damages award.

Under the PLRA, Congress categorically foreclosed prisoner suits seeking damages for non-physical injuries: "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional

facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.'" 42 U.S.C. § 1997e(e); *see also, e.g.*, *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (finding even *constitutional* claims under the First Amendment barred by the PLRA's "physical injury requirement"). Because Congress explicitly incorporated the PLRA into RLUIPA's provision for judicial relief, *see* 42 U.S.C. § 2000cc-2(e), there is no doubt that this bar applies to these statutory proceedings. *E.g.*, *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (instructing the district court on remand that the PLRA applies in a RLUIPA suit); *see also Geiger*, 404 F.3d at 375 ("[w]e agree with the majority of the other federal circuits that have addressed this issue in holding that it is the nature of the relief sought, and not the underlying substantive violation, making compensatory damages for mental or emotional injuries non-recoverable, absent physical injury"); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (finding First Amendment claim asserting non-physical injury foreclosed because "[t]he plain language of § 1997e(e) makes no distinction between the various claims encompassed within the phrase 'federal civil action' to which the section applies").

Under this controlling rule, RLUIPA cases asserting non-physical injuries—which describes the injury petitioner claims in this case, *see* Pet. App. 2a-3a—are categorically ineligible for monetary damages. Because any damages authorized under RLUIPA will be immediately forbidden under the PLRA, the issues raised in this petition cannot possibly prove relevant to the ultimate disposition of this case.

See, e.g., *Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605-06 & n.8 (5th Cir. 2008) (finding it unnecessary to decide whether RLUIPA authorizes compensatory damages because the PLRA barred the plaintiff's "claims for damages"). Indeed, the Eleventh Circuit itself—the only circuit to have suggested damages are available under RLUIPA in suits against sovereign entities—held that the very compensatory damages it found authorized under RLUIPA were immediately "precluded under the PLRA." *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

If the Court wishes to decide whether RLUIPA authorizes monetary relief against sovereign entities or individual defendants, it should do so with a vehicle arising in a different context—either a prisoner claiming physical injury or a non-prisoner alleging violations of RLUIPA's land-use provisions, 42 U.S.C. § 2000cc—to determine the important RLUIPA questions in a case where it actually matters.[1]

C. There is an additional reason why this petition is a particularly poor vehicle for resolving the

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1. Nor is this an appropriate vehicle for resolving any issue over the proper scope of the PLRA. *See, e.g.*, *Royal v. Kautzky*, 375 F.3d 720, 728 (8th Cir. 2004) (Heaney, J., dissenting) (noting limited confusion over whether "the PLRA's physical injury requirement applies to all constitutional claims"). The fact that petitioner did not even acknowledge the issue in his petition is immediately disqualifying—as is the fact that the court of appeals did not pass on the question below, *see, e.g.*, Pet. App. 24a. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *NCAA v. Smith*, 525 U.S. 459, 470 (1999).

questions presented. Petitioner now claims, for the first time, that the Civil Rights Remedies Equalization Act of 1986, 42 U.S.C. § 2000d-7, authorizes money damages even if RLUIPA does not. *See* Pet. 32 n.10. That Act explicitly waives sovereign immunity for suits, including damages suits, alleging violations of "section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*." 42 U.S.C. § 2000d-7(a)(1), (2) (emphasis added). Petitioner contends that this last clause—a catch-all sweeping in a specified class of statutes—includes RLUIPA as "a statute forbidding religious discrimination by recipients of federal funds." Pet. 32 n.10. Because petitioner did not press this point below, however, he cannot properly raise it now. *See, e.g., United Foods, Inc.*, 533 U.S. at 417. He has therefore failed to preserve the full range of issues necessary for properly considering the questions presented in the petition.

To be sure, petitioner is wrong that § 2000d-7 is applicable in the RLUIPA context. This is why the Fourth Circuit (as petitioner apparently concedes, *see* Pet. 32 n.10) has already rejected his argument. *See Madison v. Virginia*, 474 F.3d 118, 132-33 (4th Cir. 2006) (explaining that all the enumerated statutes, unlike RLUIPA, textually prohibit "discrimination" and mandate equal treatment, not RLUIPA's "religious accommodation"; because the catch-all provision, under established canons of construction, is defined by the company it keeps, it presumably does not embrace

RLUIPA). But the very fact that § 2000d-7 does have a possible role in the analysis suggests a better vehicle would be one where the petitioner raised, and the court of appeals addressed, all the issues potentially bearing on these questions. Because this is not such a vehicle, the petition should be denied.

D. The petition also suffers from a final potential vehicle problem: because qualified immunity would almost certainly bar any damages RLUIPA would otherwise allow, this is not a suitable vehicle for resolving the individual-capacity damages question. *See* Pet. 17-18 (recognizing cases applying a qualified-immunity analysis).

Indeed, petitioner simply ignores that the Fifth Circuit rejected his First Amendment claims—based on the identical constellation of facts—on the ground that he identified "no cases" proving any defendants' actions "unreasonable in light of clearly established federal law." Pet. App. 33a. Although there is some daylight between the substantive standards of RLUIPA and the core protections of the First Amendment, there is no obvious or apparent daylight on the single point the court of appeals identified in upholding immunity: the lack of *any* relevant precedent would surely suggest a strong basis for qualified immunity even under RLUIPA's more demanding standard. Because the ultimate disposition of this question will likely turn on qualified immunity—and not the Court's resolution of the question presented—this is not the right vehicle for resolving this important issue.

II. The First Question Presented—Asking Whether "Appropriate Relief" Includes Monetary Damages in Suits Against the State—Does Not Implicate Any Circuit Split on These Facts or Otherwise Warrant Review.

Petitioner has identified a weak and shallow conflict over whether RLUIPA authorizes damages actions against sovereign entities. But petitioner is incorrect that the conflict warrants this Court's review: the four-to-one split is hardly "widespread," and given that three of the five circuits confronted the issue for the first time in 2009, it is not at all "mature." *Compare* Pet. 23. And the conflict is certainly not entrenched: the Eleventh Circuit, as the single outlier, has not yet had the opportunity to revisit the question in light of the intervening decisions from other circuits. In any event, the split is not even material to the disposition of this case: because the Eleventh Circuit would find petitioner's claim barred under the PLRA (whereas every other circuit would find it barred under RLUIPA), petitioner cannot prevail under the standard currently applied in *any* circuit. Further review is therefore not warranted.

A. Four circuits have now squarely held that the phrase "appropriate relief" does not "provide the 'unequivocal textual expression' necessary to effect a sovereign's waiver to suits for damages." *Nelson v. Miller*, No. 08-2044, __ F.3d __, 2009 WL 1873500, at *14 (7th Cir. July 1, 2009); *see also Cardinal v. Metrish*, 564 F.3d 794, 801 (6th Cir. 2009) ("RLUIPA does not contain a clear indication that Congress

unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages"); Pet. App. 23a ("RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief."); *Madison*, 474 F.3d at 131 ("We conclude that RLUIPA's 'appropriate relief against a government' language falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages."). The D.C. Circuit has also reached the same conclusion in the context of the Religious Freedom Restoration Act and the federal government's sovereign immunity. See *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1023 (D.C. Cir. 2006) (RFRA's provision for "appropriate relief" does "not provide the kind of clear and unequivocal waiver of sovereign immunity governing precedent requires"); *see also id.* at 1026 (Tatel, J., concurring) ("although appellants rightly point out that the term 'appropriate relief' ordinarily 'confers broad discretion on the Court' to fashion a remedy, such sweeping statements have no applicability in the sovereign immunity context") (citation omitted).

The Eleventh Circuit, however, has alone reached the opposite conclusion. In *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), the court concluded that "the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief." 502 F.3d at 1271. Rather than asking whether RLUIPA's text expressly and unequivocally authorized damages, the Eleventh Circuit asked whether the text "explicitly *limited*" damages as a remedy. *Id.* at 1270 (emphasis

added). According to the Eleventh Circuit, any kind of relief not expressly excluded was presumptively available: "where Congress ha[s] not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies." *Ibid.* (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68-69 (1992)).

Other circuits have since responded by expressly rejected the Eleventh Circuit's approach. *See, e.g.*, *Nelson*, 2009 WL 1873500, at *14 (favoring "the Fourth and Fifth Circuits' analysis" over the analysis in *Smith*); *Cardinal*, 564 F.3d at 800 ("We disagree with the Eleventh Circuit's holding that *Franklin* is applicable to a claim against a State for money damages under RLUIPA."); Pet. App. 22a ("[t]he Fourth Circuit, we believe properly, continued the analysis where the Eleventh left off"). These circuits have criticized the Eleventh Circuit's failure to recognize the clear-statement rules that apply where the defendant is a sovereign entity. As the Fifth Circuit explained, "[t]he rules of construction that the Eleventh Circuit applied * * * disappear when we must interpret an ambiguous provision against the backdrop of a state's sovereign immunity." Pet. App. 23a. Because the Eleventh Circuit did not apply "the current Supreme Court case law requiring waivers of sovereign immunity to be 'unequivocally expressed,'" *Cardinal*, 564 F.3d at 801, its decision adopted a standard that is exactly backwards: damages are *excluded* unless the text unambiguously says otherwise, not the other way around. *E.g.*, *Nelson*, 2009 WL 1873500, at *14.

In light of this direct repudiation, and contrary to petitioner's contention, there is no reason to believe that the Eleventh Circuit's position is necessarily "entrenched." Pet. 22. Petitioner's only evidence of this point is two Eleventh Circuit orders denying rehearing en banc on this issue and an unpublished decision applying circuit precedent—but all were filed *before* these three additional circuits issued new decisions rejecting *Smith*'s approach. The Eleventh Circuit has not addressed the logic underlying the uniform decisions from other circuits, and it has not explained how its own decisions can be squared with settled precedent requiring an "unequivocal textual expression" in order to waive sovereign immunity. *Madison*, 474 F.3d at 132. There is no reason for this Court to take up the issue before it has had more time to percolate, and particularly before the Eleventh Circuit has had a meaningful opportunity to revisit the question or at least confront the flaws the other circuits have identified in its decision.

B. In any event, there is an additional reason to believe the Eleventh Circuit will revisit circuit precedent: its theory, much like petitioner's, is plainly incorrect and cannot be squared with settled law.

1. Under controlling precedent, statutory language must be unmistakably clear before a court will presume Congress intended to condition the receipt of federal funds on a waiver of immunity. *Arlington Cent. Sch. Dist. Bd. of Edu. v. Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Since that presumption extends not only to immunity from suit, but also to immunity

from damages, petitioner's theory necessarily fails unless RLUIPA's statutory language unambiguously authorized monetary relief. *E.g.*, *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992); *see also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) (recognizing "a correlation between sovereign immunity principles applicable to States and the Federal Government"). The statutory language here clearly did not.

Indeed, the phrase "appropriate relief" is entirely question-begging: it simply asks whether damages relief would be *appropriate* in this context. In light of the presumption in favor of *retaining* immunity, such relief plainly is not authorized under the act. Petitioner's contrary contention—that all relief is authorized unless expressly forbidden (Pet. 29)—would stand this settled law on its head. Words like "implied" and "presumed" simply have no role under a clear-statement standard. *See, e.g.*, *Arlington Cent. Sch. Dist.*, 548 U.S. at 300-01.

2. Contrary to petitioner's contention, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), do not hold otherwise. Pet. 27-29. Both cases involved *non-sovereign* defendants, and so the limits on relief from *sovereign* entities were simply not present. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 196-97 (1996). Where a defendant is a county or municipality—and is not protected from immunity—monetary relief may very well be "appropriate." *E.g.*, *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001); *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193-94

(2006). But as the Court held in *Lane*, the opposite rule applies in suits, such as the one here, against a sovereign entity. 518 U.S. at 196-87.

Nor is petitioner correct that other provisions of RLUIPA supply the clarity missing from the operative "appropriate relief" clause. The fact that the United States is restricted to seeking declaratory and injunctive relief (42 U.S.C. § 2000cc-2(f))—a limitation not expressly included in the provision authorizing private-party suits—is wholly beside the point. *Contra* Pet. 31. When the United States sues a State, *there is no immunity defense. See, e.g., Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare*, 411 U.S. 279, 286 (1973). Because the default in such suits is the same as the default in suits against non-sovereign defendants, it is entirely sensible that Congress would be forced to affirmatively exclude relief it had implicitly excluded under the private-party provision.

And, finally, petitioner is wrong that damages are essential, as a policy matter, for enforcing RLUIPA's conditions and ensuring adequate deterrence. Pet. 23-24. This is a policy judgment best left to the political branches. In any event, petitioner's policy judgment is not obviously correct: the very fact that prisons are adjusting their practices in response to RLUIPA suits is a positive, not negative, development. A prisoner might not receive compensation, but he does achieve the substantive change in the prison policy that he sought.

In any event, should Congress condition federal funds on a waiver of immunity from money damages,

it is entirely possible that States may choose to opt out of the statute entirely. In that event, there would be no enforcement or deterrent effect at all for prison policies that are constitutionally adequate but fall short of providing the kind of affirmative accommodations that RLUIPA requires.

C. In any event, petitioner is wrong that the shallow split on this question is even implicated by the facts of this case: because the Eleventh Circuit held, in the context of non-physical injuries, that the PLRA forbids any damages that RLUIPA otherwise allows, the outcome here would have been exactly the same even in the Eleventh Circuit. *See Smith*, 502 F.3d at 1271. Because the same claim would have the same fate in the only circuit adopting petitioner's standard, there is no meaningful split warranting further review.

III. The Second Question Presented Fails To Implicate Any Genuine Circuit Split and Does Not Otherwise Warrant Review.

There is no genuine circuit conflict on the second question and review is otherwise unwarranted.

A. Petitioner contends that the circuits are divided on the second question (Pet. 16-21), but he is wrong. Every circuit to have addressed the question has uniformly held that Congress did not intend to authorize damages actions against individuals in their personal capacity. *See Nelson*, 2009 WL 1873500, at *15-*18; *Rendelman v. Rouse*, No. 08-6150, _ F.3d _, 2009 WL 1801530, at *5-*6 (4th Cir. June 25, 2009); Pet. App. 16a-20a; *Smith*, 502 F.3d at 1272-75. These circuits have confronted the statutory text in light of

the serious constitutional undertones, and held that Congress should not be presumed to have authorized suits against third parties who the federal government could not regulate directly and who themselves received no federal money (and hence did not enter into a Spending Clause "contract," *see Pennhurst*, 451 U.S. at 17). *See, e.g.*, *Rendelman*, 2009 WL 1801530, at *5 ("Our research suggests * * * that it would be a novel use of the spending clause to condition the receipt of federal funds on the creation of an *individual capacity* damages action; we can find no instance in which the spending clause has been used in this manner."); Pet. App. 19a (describing the would-be "end-run around the limited powers of Congress to directly affect individual rights").

Contrary to petitioner's contention (Pet. 17-18 & n.6), no other circuit has confronted the question and reached the opposite conclusion. Petitioner cites a series of cases in which a circuit did not squarely address the question—or even acknowledge its existence. *See, e.g.*, Pet. App. 15a (describing one circuit's decisions as having "assumed" a personal-capacity action exists, but also noting that "its cases contain no analysis and are unpublished"). Because questions lurking in the background are not deemed properly addressed or decided, those cases *held* nothing. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'"). Indeed, there was no meaningful discussion—or any discussion—in these cases of *Pennhurst*, the limits of Congress's

spending power, or the serious consequences for our system of few and enumerated powers should Congress have the authority to regulate parties, under its spending power, who do not receive any federal funds.

The best evidence undercutting petitioner's argument is petitioner's lead case from the Seventh Circuit. *See* Pet. 17 (citing *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008)). Petitioner contends that case implicitly authorized a personal-capacity action. But the Seventh Circuit has since confronted the issue directly, and held that such suits are *not* authorized under RLUIPA. *See Nelson*, 2009 WL 1873500, at *15-*18. The circuit did not have to take the matter en banc in order to accomplish that result. Because a case does not stand for a proposition that it neither discussed nor decided, petitioner is plainly wrong that there is any current circuit split on this issue. *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality op.) ("cases cannot be read as foreclosing an argument that they never dealt with") (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)).[2]

B. In any event, the Fifth Circuit's statutory interpretation of RLUIPA was correct.

There are three canons of construction that required the court to construe RLUIPA, if possible, not to authorize suits against individuals whose conduct is beyond Congress's regulatory control and who do not

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2. Petitioner also cites as support a purported conflict on the issue among various district courts. These conflicts, of course, do not warrant review, *see* Sup. Ct. R. 10, as the supervising circuits are capable of resolving any uncertainty at the trial level.

directly receive federal funds. The first is the canon of constitutional avoidance: since "[t]he legitimacy of Congress' power to legislate under the spending power" rests on a recipient "voluntarily and knowingly accept[ing] the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17, it would be at least "'an unprecedented and untested exercise of Congress' spending power'" to bind third parties who did not agree to be bound by the "contract," *Nelson*, 2009 WL 1873500, at *17 (citation omitted).

The second is a presumption against "alter[ing] the balance of federal and state powers." *Salinas v. United States*, 522 U.S. 52 (1997). Whether or not Congress has the power to regulate individuals in a way not authorized directly by the "few and defined" powers in Article I, its use of such power would undeniably alter the federal-state balance. Under petitioner's theory, RLUIPA would stand as a "novel" and "unprecedented" attempt to reach private conduct that is traditionally controlled only by the States. And because spending legislation has the power to preempt conflicting state law, this federal legislation not only expands the enumerated limits of the federal government, but also correspondingly detracts from the powers reserved to the States. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted).

And the third canon is the requirement that Congress speak clearly when attaching conditions to the receipt of federal funds: "In interpreting language in spending legislation, we thus 'insis[t] that Congress speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Davis v. Monroe County Bd. of Edu.*, 526 U.S. 629, 640 (1999); *see also id.* at 654-55 (Kennedy, J., dissenting) ("the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach"). The authorization of personal-capacity suits would directly affect recipients in two ways. The first is that it is well recognized that government entities often indemnify their employees; so petitioner's reading would subject States to the same damages awards that they avoided under the "appropriate relief" clause. The second is that it would make state employment less attractive—and presumably require an offsetting benefit. If Congress wishes to impose this condition, it must speak clearly.

In addition, contrary to petitioner's contention, the court's interpretation of the statutory term "government" was wholly reasonable. As an initial matter, in common parlance, "government" is most naturally read to target an entity exercising state power—not to target an individual in a personal

capacity. Second, Congress did not simply say "person acting under color of State law"—it said "*other* person." Given that statutory terms are known by the company they keep, *see, e.g.*, *Madison*, 474 F.3d at 133, and considering that the preceding clauses undeniably are focused on entities exercising government power, not individuals acting for themselves, it stands to reason that Congress was limiting the third clause in 42 U.S.C. § 2000cc-5(4)(A) to the same kind and category of entities referred to in the preceding two clauses—all of which are most sensibly read as regulatory bodies. Finally, "other person" is readily construed as a catch-all provision: it covers any other branch of local government not listed by its technical name in the first two clauses, and it also catches entities such as private prison corporations—which are both "persons" and exercise state power as entities, not individuals. And, of course, all of these constructions avoid the scenario in which a third party is bound by the conditions of a spending "contract" to which he or she did not consent.

Finally, Petitioner contends (Pet. 34-36) that this issue is controlled by *Sabri v. United States*, 541 U.S. 600 (2004), but that is incorrect. *Sabri* rejected the contention that there was an insufficient *nexus* between the federal funds an entity received and a subsequent bribery prosecution. *See, e.g.*, 541 U.S. at 608. It neither squarely addressed nor resolved whether Congress could target third parties as a constitutional *means* of achieving its (otherwise permissible) objective. This, perhaps, is why the opinion never once mentions *Pennhurst* or raises any of the related concerns voiced by the four circuits to have resolved the question presented here.

In any event, petitioner does not contend—because he cannot contend—that any appellate court has addressed the theory he advances (much less resolved it in his favor). This suggests that he in fact is overreading *Sabri*. But, at a minimum, it proves that additional percolation is warranted before this Court reviews this claim.

IV. The Fifth Circuit Did Not Invalidate (Partially or Otherwise) an Act of Congress.

Petitioner is plainly incorrect that review is warranted because, according to petitioner, the Fifth Circuit effectively invalidated an Act of Congress. Pet. 25-26. The court of appeals did no such thing. As to the first question—whether "appropriate relief" authorizes damages—the court never once said that Congress lacked the power to condition the disbursement of federal funds on a waiver of immunity; it simply found that Congress had not exercised that power in this case. *See, e.g.*, *Madison*, 474 F.3d at 131. This is a *statutory* holding, based on established canons of statutory construction, and petitioner demonstrably errs in his attempt to inject a constitutional issue where it does not belong.

As to the second question—whether Congress intended to regulate third-party individuals whose conduct was otherwise beyond the federal government's regulatory power—the court of appeals carefully reviewed the statutory text, and determined that petitioner's theory would attribute to Congress a desire to push its regulatory power to the outermost constitutional limit—without any indication (much less

the required *clear* indication) that this was Congress's actual intent. By slapping a constitutional label on this statutory holding, petitioner would generate, not avoid, constitutional issues, and invite, not eliminate, a constitutional crisis over difficult issues that otherwise could be sensibly avoided by adopting a more modest approach. *Cf. Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009). If Congress truly wishes to push the envelope on this argument, it has the power to amend the statute to make its intention clear. But until it does so, the Fifth Circuit was plainly correct in avoiding the constitutional question when the statutory text did not compel petitioner's interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

JAMES C. HO
Solicitor General
Counsel of Record

C. ANDREW WEBER
First Assistant Attorney General

DANIEL L. GEYSER
Assistant Solicitor General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

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REPLY BRIEF

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IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONER

Respondents acknowledge that the decision in this case conflicts the Eleventh Circuit's holding in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), that states are not immune to damages claims under RLUIPA. BIO 10. Moreover, they do not dispute that some circuits and district courts have allowed personal-capacity suits against state officials under RLUIPA, while others have held that Congress lacks the power under the Spending Clause to authorize such suits. *See* Pet. 16-19; BIO 16-17 & n.2. At the same time, respondents do not contest that both issues are of recurring importance, given the frequency of RLUIPA litigation. Indeed, since the decision in this case, three more courts of appeals have weighed into the debate. *See Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182 (4th Cir. 2009); *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009), petition for cert. filed, __ U.S.L.W. __ (July 23, 2009) (No. 09-109).[1] Nor can respondents dispute the broader significance of the courts' conflicting views of the scope of Congress's enumerated powers and the states' reserved rights.

Nonetheless, respondents oppose certiorari, asserting that the division of the lower courts may resolve itself without the Court's intervention and that this case presents a poor vehicle for resolving the conflict in any event. Neither assertion is well-taken.

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[1] A Westlaw search for cases addressing prisoner RLUIPA claims during the same period yielded well over 150 decisions.

I. There Is No Reason To Think That The Conflict In The Lower Courts Will Resolve Itself Without This Court's Intervention.

1. Respondents argue that the acknowledged conflict between the Eleventh Circuit and four other courts of appeals over the Eleventh Amendment's restriction on RLUIPA damages claims is unworthy of the Court's attention because the Eleventh Circuit may, someday, change its mind. BIO 12. There is no basis for that speculation.

In *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), the Eleventh Circuit expressly acknowledged the conflicting view of the Fourth Circuit in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), but found its analysis unconvincing. *See Smith*, 502 F.3d at 1270. While other circuits have since disagreed with the Eleventh Circuit's holding, none has added significantly to the reasons given by the Fourth Circuit in *Madison* and rejected by the Eleventh Circuit in *Smith*. *See Nelson*, 570 F.3d at 884 (simply adopting reasoning of Fourth and Fifth Circuits); *Cardinal*, 564 F.3d at 801 (same); Pet. App. 22a-23a (adopting reasoning of Fourth Circuit). The arguments do not become more persuasive through mere repetition.

In fact, the holding of *Smith* has become settled law in the Eleventh Circuit. The court of appeals has twice denied rehearing in cases applying *Smith*, and has expressly reaffirmed its holding within the last year. *See* Pet. 22. Absent intervention by this Court, the conflict will persist, generating dramatically disparate outcomes for prisoners and state defendants alike based on nothing more than happenstance.

Respondents also are wrong in asserting that this division of authority is not "even implicated by the facts of this case" because, they say, "the outcome here would have been exactly the same even in the Eleventh Circuit." BIO 15. This is because, respondents assert, the Eleventh Circuit has held that the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), "forbids any damages that RLUIPA otherwise allows" in the absence of any physical injury. BIO 15. But the very authority they cite for this proposition – *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2008), *see* BIO 15 – expressly held that even absent proof of physical injury, the PLRA permits at least nominal damages for RLUIPA violations. *See* 502 F.3d at 1271.[2] As a result, petitioner's claim would have proceeded in the Eleventh Circuit, but has been barred in the Fifth, on the basis of a fundamental disagreement between the circuits over the meaning of a federal statute, this Court's cases, and the Constitution.

2. The petition also demonstrated that there is much confusion and apparent disagreement among the lower courts over the permissibility of individual capacity suits under RLUIPA. *See* Pet. 16-19. Respondents note that although there is a clear and considered division among the district courts on the question, the courts of appeals that have permitted individual capacity claims to go forward have not "squarely address[ed] the question." BIO 16. But that is insufficient reason to deny review here, given

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[2] And, as discussed below, the Fifth Circuit has held that the PLRA does not bar punitive damages either. *Infra*, at 10.

the close relationship between the individual-capacity question and the court of appeals' plainly certworthy Eleventh Amendment holding; the uncontested and persistent division in the district courts, where individual defendants are, in fact, being subject to, or protected from, individual liability based on accidents of geography, *see* Pet. 18-19; the incorrectness of the decision; and the importance and broader applicability of the underlying constitutional theory.

Respondents attempt to diminish the constitutional significance of the Fifth Circuit's holding, casting the decision as one of statutory construction and offering a textual defense of the decision. BIO 17-20. But the court of appeals did not base its decision on any of the asserted textual grounds, agreeing instead with petitioner and the Eleventh Circuit that the language of the statute "appears to create a right against state actors in their individual capacities" and "mirrors" the formulation of 42 U.S.C. § 1983, which permits individual capacity suits. Pet. App. 17a. The *only* reason the Fifth Circuit gave for construing the statute differently was its conclusion that Congress lacks the constitutional power to "impose *direct* liability on a non-party to the contract between the state and the federal government." Pet. App. 19a (emphasis in original).

The significance of that constitutional ruling is made clear by respondents' defense of it. In contesting the relevance of *Sabri v. United States*, 541 U.S. 600 (2004), respondents insist that the Court did not "squarely address[] nor resolve[] whether Congress could target third parties as a

constitutional *means* of achieving its (otherwise permissible) objective." BIO 20 (emphasis in original). Respondents thus assert that the constitutionality of the federal bribery statute considered in *Sabri* is open to question and, indeed, suggest that the statute is unconstitutional under the constitutional theory the Fifth Circuit applied in this case.

The increasing acceptance of that theory thus has significant implications not only for the implementation of RLUIPA, but also for the constitutionality of other Spending Clause statutes. *See* Pet. 19-20. However characterized, *see* BIO 21-22, decisions restricting the scope of federal statutes based on a novel, narrow view of Congress's legislative authority warrant review by this Court.

II. The Court Of Appeals' Decision Was Wrong.

Review also is warranted because the Fifth Circuit's decision is wrong.

1. The Eleventh Amendment does not preclude construing RLUIPA's authorization of "appropriate relief" against state defendants to include money damages. While standing alone, the phrase may appear ambiguous, this Court has made clear that the language of a Spending Clause statute must be read by funding recipients in legal context. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-71 (1992), this Court explained that part of that context is the background presumption that all appropriate relief is available to remedy the intentional violation of federal rights, *id.* at 66-71, even under a Spending Clause statute, *id.* at 74-75 (rejecting argument that "the normal presumption in

favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power").

Respondents complain that such a presumption is inconsistent with the requirement that Congress make the conditions attached to federal funds clear. BIO 12. But this Court reconciled any tension between the two principles in *Barnes v. Gorman*, 536 U.S. 181 (2002), when it held that a "funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including "compensatory damages." *Id.* at 187.

Respondents assert that *Barnes* and *Franklin* are inapposite because both "involved *non-sovereign* defendants, and so the limits on relief from *sovereign* defendants were simply not present." BIO 13 (emphasis in original). But respondents ignore that the same clear statement rule, articulated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), applies whether the defendant is a sovereign or not. That is, the requirement that Congress make clear the sovereign immunity consequences of accepting federal funds is simply an application of the more general Spending Clause requirement that Congress make the consequences of accepting federal funds clear to *all* recipients. *See Pennhurst*, 451 U.S. at 17-18 (applying clear statement rule to suit against state institution); *Barnes*, 536 U.S. at 186 (applying *Pennhurst* to suit against city police department and officials); *Franklin*, 503 U.S. at 74-75 (same as to county school). While the rule takes on additional

importance when applied to a sovereign, the application of the rule is the same.

Contrary to respondents' suggestion, *see* BIO 13-14, nothing in *Lane v. Pena*, 518 U.S. 187 (1996), is to the contrary. As the Court in *Barnes* made clear, when sovereign immunity is waived through the acceptance of conditioned federal funding, the scope of the waiver depends on the words of the statute and the background understanding that by accepting funding recipients agree to common law contract remedies, including damages. *Barnes*, 536 U.S. at 187. That principle did not apply in *Lane*, however, because the waiver there arose not from acceptance of federal funding (the defendant was an instrumentality of the federal government itself) but from a statutory consent to suit. In that context, there is no background understanding that when Congress waives the United State's immunity, it submits to all appropriate relief or to traditional contract remedies. *See Lane*, 518 U.S. at 196-97. But this case is plainly different, and governed by *Franklin* and *Barnes*, because here Texas waived its immunity not through a statutory declaration, but by accepting conditioned federal funds.

2. Respondents' defense of the Fifth Circuit's personal-capacity holding is also unconvincing.

First, respondents attempt to defend the result on the basis of the text, read in light of various cannons of construction. BIO 17-20. But none of the cannons apply when the text of a statute is clear, and here the text unambiguously subjects government officials to individual capacity suits. The statute defines "government" with great breadth, expressly including both governments and government

"official[s]." *See* 42 U.S.C. § 2000cc-5(4)(A)(i)-(ii). Because a suit against an official in her official capacity is, by definition, a suit against the government itself, *see Kentucky v. Graham*, 473 U.S. 159, 169 (1985), the only purpose in separately authorizing suits against officials is to create personal-capacity liability. Accordingly, the Fifth Circuit found no personal-capacity cause of action *despite* the language of the statute, and only because of constitutional concerns. Pet. App. 16a-20a.

Those concerns were unfounded. In *Sabri*, this Court rejected the Eighth Circuit's reasoning – which closely tracks the Fifth Circuit's reasoning in this case, *compare* Pet. App. 18a-20a – that 18 U.S.C. § 666 was not valid Spending Clause legislation because it "directly regulates the conduct of third parties and not the recipients of the federal benefits." *United States v. Sabri*, 326 F.3d 937, 947 (8th Cir. 2003); *see Sabri*, 541 U.S. at 605. This Court explained that Congress's power under the Spending Clause, supplemented by the Necessary and Proper Clause, includes not only the power to attach conditions to funds, but also the power to impose liability upon individuals whose actions "undermine[]" or "thwart[]" implementation of a federal spending program. 541 U.S. at 605. While there are surely limits to the reach of that power, there should be no doubt that imposing personal liability upon the officials responsible for implementing funding conditions is a "rational means" for ensuring compliance with those lawful requirements. *Id.*

III. This Case Presents An Appropriate Vehicle For Resolving The Question Presented.

None of the four vehicle problems the State alleges provides any basis for denying certiorari.

1. *Interlocutory Posture.* Although the Fifth Circuit remanded the case for further consideration of the merits of petitioner's chapel-access claim, those proceedings will shed no light on the distinct legal question of what remedies are available for a proven violation. Respondents nonetheless urge that the remand may render the petition "wholly academic" if petitioner's RLUIPA claims fail on the merits. BIO 3. But the remand proceedings will not pass upon the merits of petitioner's strongest claim – that the defendants violated RLUIPA by allowing him to leave disciplinary confinement for secular purposes but not to attend religious services. *See* Pet. 6-7. Rather than defend the legality of that practice on appeal, respondents abandoned it, thereby mooting petitioner's claim for injunctive relief. Pet. App. 9a-13a. As a result, the court of appeals' holding that damages were unavailable finally resolved petitioner's cell-restriction claim. Remand proceedings thus have no possibility of rendering the questions presented in the petition "academic," and the case will present precisely the same questions in precisely the same posture on final judgment.

In such circumstances, delay serves no purpose and the partially interlocutory posture presents no impediment to immediate review. *See* EUGENE GRESSMAN ET. AL, SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) (noting that certiorari may be granted "to review a nonfinal judgment where there is a conflict on a question of law with another court of

appeals . . . that would justify review of a final decree or judgment").[3]

2. *PLRA*. Respondents further argue that the question presented here is "academic" because the PLRA "stands as an independent bar to any damages award." BIO 4. As noted above, this is simply incorrect. Indeed, the Fifth Circuit specifically noted in its decision that the PLRA does not apply to awards of nominal or punitive damages, which serve to compensate for, and deter, the violation of an inmate's federal rights, not to remedy mental or emotional injuries. *See* Pet. App. 15a n.24 (citing *Mayfield v. Texas Dep't Criminal Justice*, 529 F.3d 599, 605-06 (5th Cir. 2008)); *see also Fegans v. Norris*, 537 F.3d 897, 908 (8th Cir. 2008) (nominal and punitive damages unaffected) (citing *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004)); *Calhoun v. DeTella*, 319 F.3d 936, 940-43 (7th Cir. 2003) (same); *Smith*, 502 F.3d at 1271 (nominal damages unaffected).

3. *42 U.S.C. § 2000d-7*. Respondents further argue that this case is a poor vehicle for deciding any question relating to the Eleventh Amendment because petitioner did not cite to 42 U.S.C. § 2000d-7 below. BIO 6-7. As the petition explains, resort to Section 2000d-7 is unnecessary to resolve the question presented. *See* Pet. 27-32; *see also* BIO 7-8

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[3] To the extent the Court considers the interlocutory posture of this case an impediment, it should grant the related pending petition in *Cardinal v. Metrish*, No. 09-109 (filed July 23, 2009), which arises from a final judgment, and hold this case pending its disposition.

(arguing that provision is inapplicable). But petitioner is not barred from raising it here as an additional argument in support of his basic claim, preserved below, that the Eleventh Amendment does not bar RLUIPA damages awards against the states. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 375, 379 (1995) (explaining that this Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'") (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

4. *Qualified Immunity.* Finally, respondents argue that "because qualified immunity would almost certainly bar any damages RLUIPA would otherwise allow, this is not a suitable vehicle for resolving the individual-capacity damages question." BIO 8. In particular, respondents point out that the court of appeals found petitioner's First Amendment claim barred by qualified immunity and suggest that there is no reason why petitioner's RLUIPA claim would not suffer a similar fate. *Id.*

There is no basis for that assumption. The First Amendment subjects prison rules that infringe on religious freedoms to nothing more than rational basis review, while RLUIPA applies strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). *See* Pet. App. 24a-25a, 32a-33a (explaining relevant standards). Indeed, this Court held that RLUIPA's predecessor, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, exceeded Congress's constitutional authority precisely because the "stringent test" it imposed (and RLUIPA imposes)

would render illegal a great many practices allowed by the First Amendment. *See City of Boerne*, 521 U.S. at 533-34.

Respondents make no attempt to defend the legality of the cell-restriction policy under RLUIPA. Indeed, no official could reasonably believe that denying inmates on disciplinary confinement access to religious services was the least restrictive means of serving the prison's security or administration interests when respondents were allowing inmates to leave their cells to "attend work, to eat, to shower, to have medical lay-ins, to attend educational classes, to use the law library, and to participate in other secular activities." Pet. App. 3a. In such circumstances, the lack of on-point case law is no ground for qualified immunity. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

In any event, the fact that respondents may have alternative defenses to liability is no reason to deny review of the grounds upon which the case was actually decided when those grounds are the source of recurring disagreement in the lower courts and have broad significance to the administration of federal law.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General
SARAH E. HARRINGTON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*

2. Whether state officials are subject to suit in their individual capacities for damages for violations of RLUIPA.

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In the Supreme Court of the United States

No. 08-1438

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, with respect to the first question presented in respondents' brief, the petition for a writ of certiorari should be held pending this Court's disposition of *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), and then be disposed of accordingly. With respect to the second question presented in respondents' brief, the petition for a writ of certiorari should be denied.[1]

[1] The United States, in response to this Court's invitation, has filed a brief recommending that the Court grant the petition for a writ of certiorari in *Cardinal*, *supra*.

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. The statute applies to two specific contexts, land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress further defined the terms used in this provision. It defined "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years, during which it gathered substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999) (*House Re-*

port); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698-16,699 (2000). Such "frivolous or arbitrary barriers" to religious exercise, *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (citation and internal quotation marks omitted), affected persons confined to correctional facilities in particular. *See House Report* 9-10; 146 Cong. Rec. at 16,701. Congress heard testimony about sectarian discrimination in the accommodations afforded to prisoners, see *Protecting Religious Freedom After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. 3, at 41 (1998) (statement of Isaac Jaroslawicz), as well as instances of prison officials' interfering with religious rituals without apparent justification, 146 Cong. Rec. at 16,699, 16,701.

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 18, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[2] A covered "program or activ

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[2] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in

ity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a.

To ensure that persons entitled to RLUIPA's protection may vindicate their rights, Congress created a private right of action, permitting any individual whose religious exercise has been substantially burdened in a manner prohibited by the statute to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). In addition, the United States may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. At the time he filed his complaint, petitioner was a state inmate housed in the Robertson Unit of the Texas Department of Criminal Justice-Correctional Institutions Division facility (Robertson). Pet. App. 2a. Petitioner, a Christian, alleges that he was denied the use of the prison chapel for purposes of worship (which has been referred to as his "chapel use" claim) and was denied access to all worship services while he was on cell restriction (his "cell restriction" claim). *Id.* at 2a-4a. He further alleges that inmates who practiced other faiths were provided special accommodations that were not provided to Christians, *id.* at 3a, and that inmates who were on cell restriction were permitted to attend secular activities such as work and the law library, but were not permitted to attend religious services, *ibid.*

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providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States or with Indian tribes." 42 U.S.C. 2000cc-1(b).

Petitioner filed suit pro se against the State of Texas and various prison officials alleging violations of: RLUIPA, 42 U.S.C. 2000cc *et seq.*; 42 U.S.C. 1983 for violations of his rights under the First, Eighth, and Fourteenth Amendments; and state law provisions protecting religious liberties. Pet. App. 4a-5a. He sought declaratory and injunctive relief against the respondents in their official capacities, and compensatory and punitive damages from them in their official and individual capacities. *Id.* at 5a. On the chapel-use claim, respondents conceded that petitioner and other prisoners were denied access to the chapel at the Robertson facility for the entirety of his period of incarceration. *Id.* at 6a. Respondents further noted that, after petitioner filed a grievance on this issue, no religious worship at all is permitted at the chapel. *Ibid.* On the cell-restriction claim, respondents noted that the Robertson facility changed its policy to permit certain prisoners (including petitioner) to attend religious services while on cell restriction, and the State later adopted that policy for all of its correctional facilities. *Id.* at 5a.

The district court granted summary judgment to respondents. Pet. App. 8a. The court held that: (1) the Eleventh Amendment barred petitioner's claims for monetary relief against the State and state officials in their official capacities; (2) respondents were entitled to qualified immunity from suit for damages in their individual capacities; and (3) injunctive relief was not appropriate under the circumstances. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-35a. The court first dismissed as moot petitioner's claims seeking declaratory and injunctive relief based on respondents' former cell-restriction policy. *Id.* at 9a-13a.

Turning to petitioner's RLUIPA claims against respondents in their individual capacities, the court of appeals found no basis in the statute for such relief. Pet. App. 14a-20a. The court recognized that "[a] number of circuits appear to have assumed that an individual-capacity cause of action for damages exists because the courts have conducted, or on remand have required that the district court conduct, a qualified immunity analysis." *Id.* at 15a. The court also noted, however, that the only court of appeals to have expressly addressed the issue had held that RLUIPA does not provide for damages against individuals. *Id.* at 16a-17a (citing *Smith* v. *Allen*, 502 F.3d 1255, 1272 (11th Cir. 2007)). The court of appeals agreed with that court, holding that, because RLUIPA was passed pursuant to Congress's authority under the Spending Clause, only entities that were "parties to the contract" (*i.e.*, the grant of federal funds in exchange for agreement to certain conditions) could be held liable for violation of the statute. *Id.* at 17a-19a. Individual RLUIPA defendants, the court explained, were not parties to the contract, and thus are not subject to suit in their individual capacities. *Ibid.*

The court of appeals then assumed that RLUIPA creates a damages cause of action against officials in their official capacities, but held that Texas's sovereign immunity bars such an action. Pet. App. 20a-24a. Acknowledging a division among the courts of appeals on that issue, *id.* at 21a, the court concluded that RLUIPA's language is "clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief," *id.* at 23a. Accordingly, the court held that the Eleventh Amendment bars claims for monetary relief against

Texas and its officers in their official capacities. *Id.* at 23a-24a.

Finally, the court of appeals allowed petitioner's chapel-use claims for declaratory and injunctive relief against respondents in their official capacities to proceed, Pet. App. 24a-32a, finding that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief," *id.* at 14a.

DISCUSSION

As noted in respondents' brief in opposition (at i), the question presented in this case encompasses two separate issues: (1) whether individuals may sue States or state officials in their official capacity for money damages under RLUIPA; and (2) whether individuals may sue state officials in their individual capacities for money damages under RLUIPA. The first of those issues is the subject of disagreement among the courts of appeals and warrants this Court's review. That question is the sole question presented in the petition for a writ of certiorari filed in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009). For the reasons stated in the United States' amicus brief in *Cardinal*, the Court should grant the petition for a writ of certiorari in that case, which is a better vehicle for resolution of the question. Assuming it does so, the Court should hold the petition for a writ of certiorari in this case pending resolution of *Cardinal*.

The second issue embedded in the question presented in this case—whether RLUIPA authorizes suits against officials in their personal capacities—does not warrant this Court's review. Although the court of appeals' resolution of that issue is not correct, its decision does not warrant further review because there is no division among the courts of appeals about the issue at this

time. Thus, the petition for a writ of certiorari should be denied with respect to the second question presented in respondents' brief regardless of the Court's resolution of *Cardinal*.

I. THE QUESTION WHETHER INDIVIDUALS MAY SUE STATES AND STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR MONEY DAMAGES FOR VIOLATIONS OF RLUIPA WARRANTS THIS COURT'S REVIEW, BUT IS BETTER PRESENTED IN *CARDINAL*

For the reasons stated in the United States' amicus brief in *Cardinal*, the question whether individuals may sue States or state officials for money damages under RLUIPA warrants review by this Court. The United States has therefore recommended that the Court grant the petition for a writ of certiorari in *Cardinal*. The instant case presents an additional question; for the reasons discussed below, that question does not warrant review by this Court at this time. Thus, this Court should hold the petition for a writ of certiorari in the instant case pending resolution of the petition in *Cardinal*, and then dispose of this case accordingly as to the first question presented in respondents' brief.

In the alternative, the Court may wish to grant the petition for a writ of certiorari in this case, limited to the first question presented in respondents' brief. *Cardinal*, however, is a more appropriate vehicle for resolution of that question. As noted in the United States' amicus brief in *Cardinal* (at 21-22), the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(e), often poses an independent bar to recovery of money damages by state inmates under RLUIPA because the PLRA prevents an inmate from recovering more than nominal damages for a mental or emotional injury unless he

can demonstrate a physical injury as well. 42 U.S.C. 1997e(e), 2000cc-2(e). Petitioner here does not allege any physical injury resulting from the RLUIPA violations he asserts. He therefore would not be entitled to compensatory damages in any event unless imposing a substantial burden on an individual's religious exercise in violation of RLUIPA constitutes something other than a mental or emotional injury. In *Cardinal*, by contrast, the petitioner alleges that he suffered a physical injury as a result of the alleged RLUIPA violation. For this reason, the Court may find that he is entitled to sue for compensatory damages under RLUIPA without resolving the ancillary and difficult question about whether imposing a burden on religious exercise counts as a mental or emotional injury under the PLRA.

II. THE QUESTION WHETHER INDIVIDUALS MAY SUE STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITIES FOR VIOLATIONS OF RLUIPA DOES NOT WARRANT THIS COURT'S REVIEW

Although the court of appeals' conclusion that RLUIPA does not authorize suits against state officials in their individual capacities is incorrect, it does not warrant further review at this time because there is no division among the courts of appeals on that issue. Thus, the Court should deny the petition for a writ of certiorari with respect to the second question presented in respondents' brief in opposition.

A. There Is No Division Among The Courts Of Appeals On This Issue

To date, four courts of appeals have considered whether RLUIPA permits individuals to pursue damages actions against state officials in their individual capacities. All four courts have held that it does not.

Nelson v. *Miller*, 570 F.3d 868, 889 (7th Cir. 2009); *Rendelman* v. *Rouse*, 569 F.3d 182, 189 (4th Cir. 2009); *Smith* v. *Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007); Pet. App. 15a-20a.

As petitioner notes (Pet. 17-18), several other courts of appeals appear to have assumed that individual capacity suits are available under RLUIPA when those courts were asked to decide whether a defense of qualified immunity was available to defendants sued under RLUIPA in their individual capacity. *E.g.*, *Campbell* v. *Alameida*, 295 Fed. Appx. 130, 131 (9th Cir. 2008); *Walker* v. *Iowa Dep't of Corrs.*, 298 Fed. Appx. 535, 536 (8th Cir. 2008); *Figel* v. *Overton*, 263 Fed. Appx. 456, 458-460 (6th Cir. 2008); *Ahmad* v. *Furlong*, 435 F.3d 1196, 1201-1204 (10th Cir. 2006); cf. *Salahuddin* v. *Goord*, 467 F.3d 263, 269, 273 (2d Cir. 2006) (addressing qualified immunity defense to suit under 42 U.S.C. 1983 alleging violations of statutory rights under RLUIPA). But none of those decisions actually conflicts with the holdings of the Fourth, Fifth, Seventh, and Eleventh Circuits because none specifically addressed the question of the availability of individual capacity suits. The question therefore remains open and ripe for further development in those circuits. Given these circumstances, this Court should allow the issue—and the arguments on both sides—to percolate more fully among the courts of appeals.

B. The Court Of Appeals' Conclusion That RLUIPA Does Not Authorize Damages Suits Against State Officials In Their Individual Capacities Is Incorrect

Congress has the power under the Spending Clause to spend federal revenues to "provide for the * * * general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1; *Sabri* v. *United States*, 541 U.S. 600, 605 (2004). Congress's authority "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936); accord *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Pursuant to the grant of authority in the Spending Clause, Congress may place clear conditions on a State's receipt of federal funds. Congress did exactly that when it enacted RLUIPA, imposing conditions intended to ensure that no federal funds are used to subsidize discriminatory or unreasonable restrictions on institutionalized persons' religious exercise. See, *e.g.*, *Madison* v. *Virginia*, 474 F.3d 118, 126 (4th Cir. 2006); *Cutter* v. *Wilkinson*, 423 F.3d 579, 585-587 (6th Cir. 2005); *Mayweathers* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003).

In RLUIPA, Congress expressly authorized individuals whose rights are violated under the statute to sue "any * * * official" of a State or state agency or "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A); see 42 U.S.C. 2000cc-2(a). That language plainly authorizes suits against state officials in their individual capacities (if the State has accepted federal funds for the relevant agency), and the court of appeals did not hold otherwise. See Pet. App. 17a (noting that RLUIPA's language "mirrors the 'under color of' language in [Section] 1983, which we know creates an

individual-capacity cause of action for damages"). The clarity of the statutory language provides the necessary notice to potential fund recipients that acceptance of federal funds will constitute agreement to the availability of individual-capacity suits to enforce the protections of RLUIPA. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987).

The court of appeals held, however, that Congress lacks constitutional authority to impose liability on an entity other than the fund recipient for violations of conditions on federal funds. Pet. App. 17a-20a. The court reasoned that, because this Court has sometimes analogized legislation enacted pursuant to the Spending Clause to a contract, Congress may not impose conditions or consequences on parties—such as individual defendants—who are not parties to the contract. *Id.* at 17a-19a. That reasoning is incorrect.

The Necessary and Proper Clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its powers, including the spending power. U.S. Const. Art. I, § 8, Cl. 18. Since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been settled that Congress has the constitutional authority to enact not only legislation that is "indispensable" to the exercise of its enumerated powers, but also legislation that Congress believes "convenient, or useful" and "plainly adapted" to the execution of federal power, so long as the means chosen are not prohibited by the Constitution. *Id.* at 413-414, 421; see *Sabri*, 541 U.S. at 605 (Congress may protect its Spending Clause programs "by rational means").

Just as Congress may attach conditions to its disbursement of federal funds, so it is empowered to prevent third parties from interfering with a fund recipient's compliance with those conditions. Indeed, Congress's power to prevent such interference is "bound up with congressional authority to spend in the first place." *Sabri*, 541 U.S. at 608. Attaching civil liability to an individual official's interference with a state agency's compliance with RLUIPA is a straightforward and "plainly adapted" means of ensuring that federal funds are not spent contrary to the purposes of the statute. This Court's decision in *Sabri* demonstrates the point. There, the Court held that Congress acted within its authority under the Spending Clause and the Necessary and Proper Clause in enacting 18 U.S.C. 666, which makes it a crime to bribe a state or local official of an entity receiving at least $10,000 in federal funds. *Sabri*, 541 U.S. at 602-608. Persons subject to criminal prosecution under Section 666 are no more "parties to the contract" than the individual respondents in this case. Indeed, the civil liability that respondents would suffer is significantly less onerous, especially given qualified immunity principles, than the criminal punishment that Section 666 imposes. See *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978) (state prison officials entitled to qualified immunity defense to Section 1983 suit). Congress's authorization of suits against individual officials who violate the commands of RLUIPA is therefore permissible under the Spending and Necessary and Proper Clauses.

C. Review By This Court Of This Issue Is Not Warranted At This Time

As noted at pp. 8-9, *supra*, there is a substantial question whether petitioner in this case is entitled to any compensatory damages in light of the PLRA's restriction on inmates' recovery of such damages. That fact would make this case an unattractive vehicle for consideration of this issue even if the courts of appeals were divided over its proper resolution. In addition, this Court's resolution in *Cardinal* of the first question presented in respondents' brief may influence how courts of appeals determine going forward whether damages are available under RLUIPA against state officials sued in their individual capacities. Thus, the Court should deny petitioner's request to consider the individual capacity issue at this time.

CONCLUSION

With respect to the first question presented in respondents' brief, the petition for a writ of certiorari should be held pending this Court's disposition of *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), and then be disposed of accordingly. With respect to the second question presented in respondents' brief, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

THOMAS E. PEREZ
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General

SARAH E. HARRINGTON
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys

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HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONER

KELLY J. SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 East 18th Street, Suite 230
Plano, Texas 75074
Telephone: (972) 423-3131

Counsel for Amicus Curiae

CROCKETT LAW BRIEF PRINTING CO. (800) 22-6064
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether states and state officials may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals [NAE] is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. NAE believes that religious freedom is a gift of God, and it is vital to limiting the government that is our American constitutional republic. RLUIPA is of vital importance to *amicus*'s constituents because it is the most effective, and sometimes the only effective, means available to protect religious ministries from overzealous city councils and county boards. Local governments have an incentive to quell religious ministries with land use regulations in order to attract tax revenue generating businesses. Local governments do not always appreciate the positive contributions of religious ministries to the community because such contributions are not easily measured in dollars and cents. RLUIPA leveled the playing field. Without a robust RLUIPA, the incentives to exclude religious ministries from a

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[1] All counsel of record received notice of *amicus*'s intention to file this brief at least ten days before this brief was due and all parties to this appeal consented to the filing of this brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

community through land use regulations will prevail and lead to pecuniary harm.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's ruling in *Sossamon v. Texas* arguably nullifies the Religious Land Use and Institutionalized Persons Act's ["RLUIPA's"] application to religious land use disputes. The hearings leading up to passage of RLUIPA revealed that congressional action to enforce the free exercise of religion in the area of land use regulation was imperative. The hearings compiled a large body of evidence that demonstrated the freedom to assemble and worship was routinely violated by local governing bodies nationwide. RLUIPA, enacted under the authority provided by the Commerce and Spending Clauses, as well as Section 5 of the Fourteenth Amendment, was to remedy these impediments to religious persons and assemblies by providing "appropriate relief" and "broad protection of religious exercise" to the "maximum extent" permitted by law.

The Fifth Circuit has inadvertently endangered the land use protections RLUIPA provides for synagogues, mosques, and churches. In broad and unrestrained language, the circuit court denied individual capacity claims under RLUIPA predicated on the contract theory of the Spending Clause: those not a party to the contract are not restrained by the statute. This arguably altered the standard for

determining RLUIPA's general applicability to whether the respective violator of RLUIPA's provisions was a party to this same contract. Cities, counties, and local zoning officials are the perpetrators of most all the religious land use violations RLUIPA was to prevent and are thus the very defendants Congress contemplated when enacting RLUIPA. However, as non-parties to the contract under the Fifth Circuit's rationale these same cities, counties, and local zoning officials are immune from the requirements of RLUIPA altogether.

The Fifth Circuit has opened wide the door to exempting local governments from liability for any relief mandated by RLUIPA, injunctive or otherwise. This is tantamount to striking down the statute as it relates to land use regulation. Such an unreasonable result compels review in this case. The Fifth Circuit's decision is not only in conflict with this Court and other courts of appeals, but is contrary to the plain language of RLUIPA and its legislative record. Failure to reverse the decision below will cripple a vital civil rights statute relied upon by untold numbers of religious groups and persons.

ARGUMENT

I. In its attempt to sweep aside prison litigation, the Fifth Circuit inadvertently opened the door to invalidate RLUIPA's application to all religious land use disputes.

"The right to assemble for worship is at the very core of the free exercise of religion." 146 CONG. REC. 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). Accordingly, the "right to build, buy or rent" a "physical space" in which to worship "is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id.* With these seemingly self-evident assertions the lead sponsors in the U.S. Senate of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") began their explanation of the need for RLUIPA's religious land use provisions. RLUIPA is "based on three years of hearings" before both the House and Senate "that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." *Id.* As recognized by the Senate, "[i]t is important to note that [RLUIPA] does not provide a religious assembly with immunity from zoning regulation." 146 CONG. REC. 14284 (2000) (statement of Sen. Hatch). It merely "prohibits discrimination against religious assemblies and institutions, and prohibits the total exclusion of religious assemblies from a jurisdiction." *Id.* Not surprisingly, RLUIPA unanimously passed both the House and Senate, and did so with the support of "over 50 diverse and respected groups, including the Family

Research Council, Christian Legal Society, American Civil Liberties Union, and People for the American Way." *Id.* (statement of Sen. Kennedy); *see* S.2869, Bill Summary and Status for 106th Congress (2000).[2]

Religious institutions, such as synagogues, churches and mosques, usually represent a non-revenue producing land use. With cities and counties across the United States experiencing significant declines in revenue, many would prefer to grant a development permit to a revenue producing shopping mall rather than a synagogue. Barring RLUIPA, religious institutions have inequitable bargaining power with municipalities as compared to Home Depot, the AMC movie theatre, or a Hilton hotel. Commercial development represents revenue. To many local governing bodies religious institutions represent wasted space, as well as lost revenue and jobs.

A. Congress intended to provide religious institutions protection from hostile local authorities, not just state authorities.

The years of hearings leading up to passage of RLUIPA revealed that legislative action to enforce the free exercise of religion in the area of land use regulation was imperative. The record of the hearings compiled "massive evidence" that the freedom to assemble and worship is "frequently" violated by local

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[2] The bill summary and status is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:@@@L&summ2=m& (last visited June 22, 2009).

governing bodies nationwide. 146 CONG. REC. 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). This is particularly true for cases involving "new, small, or unfamiliar churches," "especially in cases of black churches and Jewish shuls and synagogues." *Id.*

For example, an Orthodox Jewish rabbi in Miami was "threatened with criminal prosecution" for leading prayers in a converted garage in a single-family residential area. H.R. REP. NO. 106-219, at 10 (1999).[3] The town of Wayne, New Jersey "denied a permit to a black church, after one official opposed the permit on the ground that the city would soon look like Patterson, a predominately African-American city nearby." *Id.* at 23 n.111. A Mormon congregation in Tennessee was prohibited from using as a church a former church building of another faith because the city determined that allowing it to do so was not "in the best interests" of the city and wanted no more churches in the community. *Id.* at 22. Other churches requested permits to use a flower shop, a bank, and a theater as places of worship. In each case, the governing body responded by rezoning each parcel of land into a "tiny manufacturing zone[ ]" in which a church was a non-permissible use. *Id.* at 21-22.

The legislative record cites to a study of religious land use regulation conducted by Brigham Young

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[3] H.R. REP. NO. 106-219, at 18-24, was identified as summarizing the hearing record for RLUIPA. 146 CONG. REC. 16698-16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

University that found "Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases." *Id.* at 20. Specifically, the study determined that "[r]eligious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches," and that these same groups accounted for "34% of the reported litigation involving accessory uses at existing churches." *Id.* at 20-21. The same study found that while "Jews account for only 2% of the population," they account for "20% of the reported location cases and 17% of the reported accessory use cases." *Id.* at 21.

Such discrimination and disparate treatment is not limited to small churches and minority religions. The record also referenced a 1997 survey by the Presbyterian Church (U.S.A.) – the largest Presbyterian body in the United States – of its 11,328 congregations. The survey focused on land use issues. Though a mainline Protestant denomination, the survey revealed at least 15% of the congregations had experienced significant conflict over a land use permit and/or an increase in the cost of their projects of more than 10% due to conditions imposed on the church by government. H.R. REP. No. 106-219, at 21; Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 772-73 (1999) [hereinafter "Laycock"].[4] These

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[4] Laycock at 769-83 was identified as summarizing the hearing record for RLUIPA. 146 CONG. REC. 16698-16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

statistics amount to discriminatory actions against hundreds of churches because they are churches and untold dollars in increased costs and delays.

The record further revealed that discriminatory and biased actions against churches by many local governing bodies are nothing short of flagrant. In Portland, Oregon, a city official ordered a Methodist church to limit attendance at its worship services to 70 persons when the church's facility could accommodate 500. 146 CONG. REC. 14285 (2000). Arapahoe County, Colorado, "imposed numerical limits on the number of students who could enroll in religious schools" and imposed similar restrictions "on the size of congregations of various churches" as a means to "limit[ ] their growth." *Id.* Officials in Douglas County, Colorado, actually proposed limitations on the operational hours of a church in the same way they might limit a closing time for taverns. *Id.* The City of Los Angeles prohibited fifty elderly Jews from meeting for prayer in a house in the residential neighborhood of Hancock Park. It allowed other places for secular assemblies in the neighborhood, such as schools and recreational uses, but "refused this use because Hancock Park had no place of worship and the City did not want to create a precedent for one." H.R. REP. NO. 106-219, at 22. The City of Richmond "required places of worship wishing to feed more than thirty hungry and homeless people to apply for a conditional use permit at a cost of $1,000, plus $100 per acre of affected property." 146 CONG. REC. 14285 (2000). That particular ordinance

"regulated only places of worship, not other institutions, and only eating by persons who are hungry and homeless." *Id.* These illustrations represent only a small fraction of the violations compiled in the legislative record. The record contains dozens of additional examples of similar land use discrimination against churches and religious bodies, violations which represent the mere "tip of the iceberg." Laycock at 773.

Congress clearly and explicitly intended to protect religious land use from overzealous local government officials and entities. The legislative purpose is not in question. Religious institutions generally do not have land use disputes with states. Their disputes are usually with cities and counties. The Fifth Circuit failed to confine its analysis to individual capacity claims, but with a sweeping pen excluded from accountability all non-parties to the RLUIPA contract between Congress and the states. In so doing, the Fifth Circuit may have inadvertently given cities and counties a near absolute exemption from RLUIPA, gutting the very intent of the Act. This makes no sense. If the Fifth Circuit's opinion is taken to its logical conclusion, cities, counties, and local zoning officials are immune from the application of RLUIPA altogether, contrary to the obvious congressional intent. Failing to issue a *writ of certiorari* will result in great harm.

B. If state officials in their individual capacities are not parties to the contract and thus not subject to RLUIPA, then arguably cities and counties are also excluded from the application of RLUIPA.

The Fifth Circuit's justification for denying individual capacity actions under RLUIPA is that an individual is not a "party" to the Spending Clause "contract" formed between the federal and state governments. According to the Fifth Circuit, because RLUIPA was enacted solely under the Spending Clause (which *amicus* disputes, see Section I-C, *infra*), RLUIPA fails to "impose *direct* liability on a non-party to the contract between the state and the federal government." Pet. App. 19a. The Fifth Circuit agreed with the Eleventh Circuit that "only the grant recipient – the state – may be liable for [a RLUIPA] violation." Pet. App. 17a.

This ruling lays the groundwork and opens wide the door to completely exempt local government from liability for any relief mandated by RLUIPA. If the standard for determining RLUIPA's applicability is whether the respective party defendant is a party to the RLUIPA "contract," cities, counties and local zoning officials – non-parties to the "contract" – are immune from RLUIPA's requirements entirely. Congress, however, obviously intended to alleviate the burden on religious institutions facing exclusion at the hand of zoning entities such as municipalities. *See* Section I-A, *supra*. To exclude all non-parties to

the "contract" is to exclude all of the known defendants contemplated when Congress passed the legislation. Such an absurd result compels review in this case. Not only is there a well-defined conflict between circuits, failure to reverse the decision below will damage a vital civil rights statute.

The Fifth Circuit has reversed almost a decade of religious land use protection under RLUIPA. Its approach is in conflict with the Seventh, Ninth, and Tenth Circuits, see Pet. at 17-18; Pet. App. 15a & n.23, all of which held that RLUIPA has application beyond injunctive relief against state officials in their official capacities. The Fifth Circuit's holding nullifies an act of Congress that enjoyed wide bi-partisan support and was signed into law by President Clinton. Excluding all non-parties, including cities and counties, from the application of RLUIPA is tantamount to striking down the statute as it relates to land use regulation because almost all land use involves either city or county regulation.

To render a portion of a statute meaningless contravenes a canon of statutory construction. *See Beck v. Prupis*, 529 U.S. 494, 506 (2000). Congress obviously intended RLUIPA to apply to cities and counties. Thus, the Fifth Circuit's rationale that Congress enacted RLUIPA solely under the Spending Clause is wrong. As shown in Section I-C, *infra*, Congress enacted RLUIPA under the Spending Clause, the Commerce Clause, and its enforcement powers under Section 5 of the Fourteenth Amendment.

C. Congress enacted RLUIPA pursuant to its powers under the Commerce Clause, Spending Clause, and Section 5 of the Fourteenth Amendment.

Recognizing the widespread and increasing nature of the problem, Congress enacted RLUIPA pursuant to its power to regulate under the Commerce Clause, Spending Clause, and Section 5 of the Fourteenth Amendment. H.R. Rep. No. 106-219, at 27; 146 CONG. REC. 16698-16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy); 146 CONG. REC. 14284 (2000) (statement of Sen. Kennedy). This scope of application is set out not only in the legislative record but in the text of RLUIPA itself. *See* 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b) (2000). This strongly undercuts the Fifth and Eleventh Circuits' opinions limiting RLUIPA as enacted solely under the Spending Clause and supports the more reasonable determinations of this Court and other circuit courts of appeal. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (recognizing Congress "invok[ed] federal authority under the Spending and Commerce Clauses" to enact RLUIPA); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006) (stating "Congress relied on its Spending and Commerce Clause [sic] authority" to enact RLUIPA); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005) (recognizing that Congress enacted RLUIPA under both the Spending and Commerce Clauses). The Court should grant the petition to resolve this conflict and give appropriate guidance to courts not to interpret RLUIPA solely

through a Spending Clause prism contrary to clear congressional intent.

It is no argument that the Fifth Circuit's analysis only involved state liability and did not extend its analysis to the land use portion of the statute. Many of the operative portions of RLUIPA are the same for prison inmates and religious institutions, including the section providing for remedies. The Fifth Circuit failed to consider that Congress, under both the Spending and Commerce Clauses, used identical language to protect both institutionalized persons and religious land use. *See* 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b) (2000). The relief available both to religious bodies and institutionalized persons is identical, as well. *See* 42 U.S.C. § 2000cc-2 (2000). As the authority to enact and the relief available under both Section 2000cc and Section 2000cc-1 are identical, any ruling affecting or interpreting the authority to enact or the relief available under one section directly affects the other. Thus, the Fifth Circuit's ruling on the congressional authority to enact RLUIPA and on the relief it provides, though delivered in the context of the rights of institutionalized persons, directly affects RLUIPA's protection of churches. If the Fifth Circuit intended to bifurcate the congressional authority to enact RLUIPA between states and political sub-divisions of the state such as municipalities, its analysis failed to reveal such a fine distinction.

D. The Fifth Circuit's interpretation of RLUIPA directly conflicts with that of the United States Department of Justice.

The Fifth Circuit arguably eliminated a church's or other religious organization's ability to seek damages for a violation of RLUIPA. Such an unreasonable conclusion stands in stark contrast to established U.S. Department of Justice analysis. The DOJ, assessing the relief available under RLUIPA, determined that "[r]eligious institutions and individuals whose rights under RLUIPA are violated may bring a private civil action for injunctive relief and *damages*."[5] While the text of RLUIPA does not expressly address damages,[6] the Fifth Circuit admitted that the "plain language of RLUIPA * * * seems to contemplate such relief." Pet. App. 16a. To reject that "plain language" is problematic in its own right. See *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008) (stating the "strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances.") (internal quotation marks omitted);

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[5] U.S. Department of Justice Civil Rights Division, A Guide to Federal Religious Land Use Protections, *available at* http://www.usdoj.gov/crt/religdisc/rluipa_guide.pdf (last visited June 15, 2009) (emphasis added).

[6] The text of RLUIPA does, however, call for "appropriate relief" and "broad construction" all "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. §§ 2000cc-2(a), 2000cc-3(g) (2000).

Carcieri v. Salazar, 129 S. Ct. 1058, 1066-1067 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Jimenez v. Quartermen*, 129 S. Ct. 681, 685 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.").

The DOJ's interpretation should be given considerable weight given that, in the text of RLUIPA itself, Congress provided the Attorney General express authority to "enforce compliance with this Act." 42 U.S.C. § 2000cc-2(f) (2000). When, such as here, the terms of a statute contain some alleged ambiguity, in comparable circumstances this Court has determined that the statutory interpretation of the government agency authorized to enforce the statute should be given due deference. *See, e.g., I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (finding that the court of appeals should have given appropriate deference to the statutory construction of the Attorney General regarding a statute he was charged with enforcing). The Attorney General's express statutory authority to enforce RLUIPA and the DOJ's corresponding assessment of the relief available under RLUIPA speak loudly to the error of the decision below. This petition is important because it provides an opportunity for the Court to articulate for the first time the scope of relief and class of defendants Congress intended when it enacted the legal reforms in RLUIPA.

II. If damages are not available to religious institutions in land use cases under RLUIPA, cities and counties may easily manipulate the legal system to financially eliminate religious institutions from the city or county limits.

The Fifth Circuit's restrictive reading of the relief available under RLUIPA presents a significant problem for churches and other religious organizations. As the legislative record reveals, prior to the enactment of RLUIPA churches were the victims of increasing discrimination in the area of zoning and other land use regulation. Such free exercise violations cause extensive monetary damages and delay to churches and religious bodies. *See, e.g.*, 146 CONG. REC. 19125 (2000) (a Muslim mosque estimated $200,000 to cover its legal fees and relocation to another town after it was denied use of a building); 146 CONG. REC. 14285-14286 (2000) (a Chicago church spent $5,000 and wasted a year seeking a special use permit); H.R. REP. NO. 106-219, at 21 (a comprehensive survey of thousands of Presbyterian churches revealed a large number of churches experienced an increase in cost of projects of more than 10% due to conditions imposed on the church by local government).

While RLUIPA changed the law, the sentiment of these governing bodies remains the same. Religious institutions still face intentional discrimination. Such hostility to religion is more prevalent in some geographic areas than others. In the arena of land use,

there are strong commercial interests at stake. Religious institutions are routinely seen as obstacles to local commercial progress, even in the most religiously tolerant cities and towns. Religious institutions, by virtue of their IRS 501(c)(3) status, are precluded from advocating for or against those who seek local elective office. Their commercial competitors are not so restrained. The political and economic disadvantages of religious institutions further compound their inability to negotiate with city officials to the same extent as a promising commercial enterprise that produces jobs and tax revenues. Thus, the incentive of cities and counties to try to wear down a church through litigation is alluring. RLUIPA significantly reduced that incentive and provided churches the much needed bargaining equalizer to reach fair local decisions regarding land use.

Even if churches may seek injunctive relief under RLUIPA against cities, counties, and local zoning officials, which the Fifth Circuit has brought into serious question,[7] under the Fifth Circuit's ruling local governing bodies may now discourage religious land use with the same hostile tactics employed prior to RLUIPA. Government, relying on a church's often

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[7] *See* Section I-B, *supra*. The Fifth Circuit provided no explanation for why its reasoning should be limited to damages alone. While the Fifth Circuit made some attempt to restrict its analysis to damages relief, it has laid the groundwork and opened wide the door to completely exempt local government from liability for any relief mandated by RLUIPA, injunctive or otherwise.

humble monetary resources, may now force a delay in a church's land use request and require the church to litigate, knowing any damages inflicted by the delay will never be required of it. As "churches most exposed to zoning problems are young and often have little capital," Laycock at 765, such tactics are enough to chill a church's free exercise of religion and defeat the purposes of RLUIPA. *See, e.g.*, Laycock at 765 ("Litigation is expensive and uncertain at best, and in addition to the costs of litigation, the church has to commit to a lease or a mortgage to hold the property while it litigates."); Laycock at 765 n.33 (quoting *Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (oral testimony of John Mauck)[8] ("The churches don't have the money, or the municipalities can wait them out because a church has a choice of buying a building that it can't use or having to carry that expense and pay the mortgage every month, if you can get a mortgage, on a building that it can't use, or walking away.")).

A savvy city could easily deny a synagogue's permit to build for reasons that violate RLUIPA. When the synagogue sues, the city could deploy a massive defense, draining the synagogue's limited financial resources by exposing it to protracted and sharply contested litigation. Then, when it becomes obvious

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[8] The oral testimony is available at http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_0f.htm (last visited June 18, 2009).

that the synagogue is on the brink of victory, the city could simply approve the synagogue's permit to build, thereby mooting the request for injunctive relief. The stark facts of *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283 (1982), are little comfort in the face of a city attorney proclaiming to the court that the city now "sees the light" and will abide by the law. The synagogue obtains a hollow victory, as its funds set aside to build its place of worship have been expended on the costs of experts, litigation, depositions, and attorneys – none of which are recoverable under *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598 (2001). The land will sit empty, the faithful will be without their place of worship, and the city will have prevailed in its violation of RLUIPA. Does such a scenario seem extreme? It is a scenario that represented the day to day practices of local governments before RLUIPA was enacted.

CONCLUSION

The petition for a *writ of certiorari* should be granted and the ruling of the Fifth Circuit should be reversed.

Respectfully submitted,

KELLY J. SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 East 18th Street, Suite 230
Plano, Texas 75074
Telephone: (972) 423-3131

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
Petitioner,

v.

TEXAS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Jason P. Gosselin
Vincent E. Gentle
Matthew S. Barndt
DRINKER, BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103-6996
(215) 988-2700

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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RELEVANT CONSTITUTIONAL AND STATUORY PROVISIONS

I. Constitutional Provisions

The Commerce Clause of the United States Constitution provides, in relevant part:

> Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The Section 5 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act provides, in relevant part:

Section 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Section 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

Section 2000cc-5. Definitions

In this chapter:

. . . .

(4) Government

The term "government"—

(A) means--

(i) a State, county, municipality, or other governmental entity created under authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law.

INTEREST OF AMICI[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the Institute was one of the moving forces behind the drafting and enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and has and continues to represent individuals, religious assemblies and institutions that are the intended beneficiaries of RLUIPA. The Rutherford Institute fears that the broad ruling of the Court of Appeals for the Fifth Circuit will undermine the salutary purposes of RLUIPA and eviscerate the protection it was meant to provide to religious liberty.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action were notified of The Rutherford Institute's intent to file this *amicus curiae* brief on June 10, 2009 and have consented to the filing of this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

The decision of the Fifth Circuit undermines the intent of Congress, ignores the plain language of RLUIPA and threatens the free exercise of religion Congress intended to foster when it enacted the legislation in 2000. More specifically, the Fifth Circuit's broad holding that RLUIPA was passed pursuant only to Congress's power under the Spending Clause of Article I of the Constitution throws into doubt the availability of damages to all RLUIPA plaintiffs, whether under the land use provisions of 42 U.S.C. § 2000cc or the institutionalized persons section of 42 U.S.C. § 2000cc-1.

If institutionalized persons may recover compensatory damages only against the recipients of federal funds, serious doubt is raised as to whether litigants suing under the land use provision are also barred from recovering damages. The unavailability of a damages remedy will seriously undermine the effectiveness of RLUIPA as a bulwark against local government land use decisions that substantially burden the religious mission of churches and religious assemblies. Cities, towns and other local governments will have no incentive to comply with the statute, thus compromising the intent of the act and threatening religious freedom.

RLUIPA has a clear and legitimate jurisdictional basis in the Commerce Clause. Accordingly, even if compensatory damages are not

available pursuant to Congress's Spending Clause authority, litigants may recover all appropriate relief, including damages, against local governments under the Commerce Clause. Further, Congress appropriately exercised its enforcement power under Section 5 of the Fourteenth Amendment by allowing litigants to base their claim for compensatory damages on discriminatory land use regulations that impose a substantial burden on religious exercise.

For these reasons, this Court should grant the petition for a writ of certiorari and confirm that litigants suing under the land use provision of RLUIPA retain their right to recover compensatory damages because the statute has valid jurisdictional bases in the Commerce Clause and Section 5 of the Fourteenth Amendment.

ARGUMENT

I. The Court Should Clarify That Litigants May Recover Damages Against Local Governments Under The Land Use Provision Because Section 2000cc(a)(2)(B) Functions As A Valid Exercise of Congress's Commerce Clause Authority.

In the decision at issue here, the Fifth Circuit broadly held that "an action under RLUIPA does not exist for individual-capacity claims[.]" *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 329 (5th Cir. 2009). Even though, as cogently pointed out by the Petitioners, the text of RLUIPA's judicial relief

section clearly evinces Congress's intent to allow claims for damages against individuals and entities other than States, the Fifth Circuit found that such claims are barred unless the individual or entity receives federal funds. It reasoned that RLUIPA "was passed pursuant to the Spending Clause," and Congressional enactments pursuant to the Spending Clause do not themselves impose *direct* liability on a non-party to the contract between the state and the federal government." *Sossamon*, 560 F.3d at 329 (emphasis in original). The Fifth Circuit declined "to read Congress's permission to seek 'appropriate relief against a government' as permitting suits against RLUIPA defendants in their individual capacities." *Id.*

The holding below that RLUIPA depends solely on the Spending Clause power substantially restricts on the remedial scope of RLUIPA. Although the Fifth Circuit's decision is in the context of RLUIPA's institutionalized persons provision, its ruling on the constitutional basis for RLUIPA is broad enough to be applied to RLUIPA's land use provision. If only parties to a contract for the receipt of federal funds can be liable under RLUIPA, many entities and individuals that heretofore were considered defendants to a RLUIPA claim would now be outside the reach of the statute. In particular, local governments – the natural targets of RLUIPA's land use provision, 42 U.S.C. § 2000cc(a) – would not be subject to suit by a religious assembly or institution which has had its religious exercise substantially burdened by a local land use decision.

Instead, a suit would be permitted only in the rare instance in which a local land use decision is related to a program that received federal funding.

This Court should grant the petition for the purpose of rejecting the Fifth Circuit's broad holding that RLUIPA is supported only as an exercise of Congress's Spending Clause power and also recognizing that RLUIPA allows litigants to recover damages when local governments impose a land use regulation that affects interstate commerce because the Act is a proper exercise of Congress's Commerce Clause authority.

A. The Eleventh Amendment Does Not Bar Litigants From Recovering Damages Against Local Governments.

RLUIPA defines government as "a State, county, municipality, or other governmental entity created under the authority of the State; any branch, department, agency, instrumentality, or official of an entity . . . and any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4)(A) (2006). Although Congress cannot abrogate the Eleventh Amendment sovereign immunity of states pursuant to its Commerce Clause power, local governments, including counties and municipalities, are not entitled to this immunity from suit. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot unilaterally authorize suits against states pursuant to its Commerce Clause authority);

Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Servs., 532 U.S. 598, 609 n.10 (2001) ("Only States and state officers acting in their official capacity are immune from suits for damages in federal court. Plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State.") (citation omitted); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990) (Brennan, J., concurring) (finding that under this Court's Eleventh Amendment jurisprudence, even "when a State creates subdivisions and imbues them with a significant measure of autonomy . . . these subdivisions are too separate from the State to" justify sovereign immunity); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations." (citations omitted)). Therefore, litigants may bring suit against local governments and their officials to obtain compensatory damages when a substantial burden on religious exercise affects interstate commerce. *See* 42 U.S.C § 2000cc-2(a); *see also Mt. Healthy*, 429 U.S. at 281.

B. Section 2000cc(a)(2)(B) Contains An Express Jurisdictional Element.

Section 2000cc(a)(2)(B) of RLUIPA provides that the substantial burden provision applies in any case in which "the substantial burden affects, or

removal of the substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability." *See* 42 U.S.C. § 2000cc(a)(2)(B). This language explicitly connects land use regulations that impose a substantial burden on religious exercise with interstate commerce using language that mirrors the Commerce Clause. *See* U.S. Const. art. I § 8, cl. 3 ("Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes."). This Court has held that Congress's expression of a jurisdictional nexus is sufficient to satisfy the requirements of the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598, 612 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."); *see also United States v. Lopez*, 514 U.S. 549, 561 (1995) (determining that statute was not a valid exercise of congressional power under the Commerce Clause because it contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce").

Accordingly, the express jurisdictional element in section 2000cc(a)(2)(B) of RLUIPA is sufficient to invoke congressional authority under the Commerce Clause. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007).

C. Section 2000cc(a)(2)(B) Directly Regulates Economic Activity.

Burdens on religious exercise imposed through land use regulations have a significant effect on interstate commerce. In *Lopez*, this Court identified three bases of Congress's authority to regulate interstate commerce: the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities having "a substantial relation to interstate commerce." 514 U.S. at 558-59. When the source of Congress's authority to regulate pursuant to the Commerce Clause derives from activities having a substantial effect on interstate commerce, the activity must deal with "commerce or any sort of economic enterprise" or exist as "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Even if an activity is economic in nature, the link to interstate commerce must be direct, not attenuated. *See Morrison*, 529 U.S. at 612; *see also Lopez*, 514 U.S. at 563-67.

In determining whether the activity is economic in nature, this Court has held that non-profit organizations, including religious institutions, engage in interstate commerce in a variety of ways and are appropriately subject to the Commerce Clause. *See Camps Newfound v. Town of Harrison*, 520 U.S. 564, 583-84 (1997) (finding Commerce Clause applicable to non-profit organizations because

"they purchase goods and services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of sources, some of which are local and some out of State"). Additionally, zoning regulations that affect the rental of property and the development of land can have a considerable effect on interstate commerce. In *Groome Resources, Ltd. v. Parish of Jefferson*, the Fifth Circuit held that a special accommodations provision under the Fair Housing Amendments Act of 1988 implicated interstate commerce when a plaintiff could not obtain a variance from a local zoning ordinance in order to operate a group home. 234 F.3d 192, 205 (5th Cir. 2000). The court reasoned that the refusal to grant a reasonable accommodation under the statute impacted the housing market because it prevented the plaintiff from effectively purchasing or selling property. *See id.* at 205-06. Because the denial of the variance functioned as "an act of discrimination that directly interfere[d] with a commercial transaction," the court determined that the reasonable accommodations provision of the statute implicated economic activity. *See id.* at 206; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964) (holding that "the power of Congress to promote interstate commerce also includes the power to regulate . . . local activities . . . which might have a substantial and harmful effect upon that commerce.").

Regulations that impose a substantial burden on religious exercise similarly implicate economic activity. *See Freedom Baptist Church of Delaware*

County v. Twp. of Middletown, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002) ("[I]nsofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause."). Specifically, such regulations hinder the development and use of property, such as the purchase, sale, construction, and renting of land – all activities that are commercial in nature. The Second Circuit has found that the land use portion of RLUIPA functions as a valid exercise of the Commerce Clause for that very reason. *See Westchester Day School*, 504 F.3d at 354 (holding that "the evidence need only demonstrate a minimal effect on commerce to satisfy the jurisdictional element"). The Second Circuit concluded that an Orthodox Jewish day school's claim based on the refusal of the town to issue a permit for expansion of its facilities fell within Congress's Commerce Clause authority because "commercial building construction is an activity affecting interstate commerce." *See id.* Additionally, unlike the activities in question in *Lopez* and *Morrison*, discriminatory land use regulations have a discernible link to interstate commerce because imposing substantial burdens directly prevents religious organizations from buying land and initiating construction activities. *See Groome*, 234 F.3d at 214 (finding link "connecting direct discrimination against the disabled with the larger and more subtle effects on the interstate supply of housing").

D. The Legislative History Of RLUIPA Makes Express Findings Detailing The Effect Of Discriminatory Land Use Decisions On Interstate Commerce.

Congress has also made various findings describing the impact of discriminatory land use regulations on interstate commerce. Congressional findings regarding the effect of an activity on interstate commerce are not required when a statute, such as the land use provisions of RLUIPA, regulates an activity that clearly implicates interstate commerce, but they do serve as additional, relevant support for Congress's judgment that discriminatory land use regulations substantially effect interstate commerce. *See Lopez*, 514 U.S. at 640.

In a joint statement, Senators Hatch and Kennedy described the explicit jurisdictional element of the statute and noted that burdens on religious exercise through land use regulations will impact interstate commerce. *See Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, S7774-78 (daily ed. July 27, 2000). Further, the Senators pointed out the specific effects of such discrimination when "the burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods." *See id.* (quoting testimony of Marc D. Stern that "'many activities of religious not-for-profit corporations come

within the Commerce Clause,' including purchasing and providing goods and services").

The House Subcommittee also reviewed confirmed data compiling the aggregate effect of these types of transactions. *See Lopez*, 514 U.S. at 562 (suggesting that congressional committee findings are also relevant). The House Report indicates that "the exercise of religion sometimes requires commercial transactions, such as the construction of churches, the hiring of employees, or the purchase of supplies and equipment." *See* H.R. Rep. No. 106-219, at 28. The House Report further clarifies that proving a substantial burden implicates interstate commerce is essential to asserting a claim under the land use section of RLUIPA. *See* H.R. Rep. No. 106-219, at 16. This legislative record provides additional support for Congress's authority to enact the statute pursuant to the Commerce Clause. *See Lopez*, 514 U.S. at 640.

For all these reasons, RLUIPA, carefully tailored to prohibit only discriminatory regulations that implicate interstate commerce, is a valid exercise of Congress's Commerce Clause authority.

II. The Court Should Confirm That Litigants May Recover Compensatory Damages Because Congress Properly Exercised Its Authority to Pass Section 2000cc(a)(2)(C) Pursuant To Section 5 Of The Fourteenth Amendment.

The authority of Congress to enforce the Due Process Clause of the Fourteenth Amendment, including the rights that the First Amendment guarantees, provides an independent basis for enacting section 2000cc(a)(2)(C). *See, e.g.*, U.S. CONST. amend. XIV, § 5 ("Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); *City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997) (finding that "Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion."); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (holding that Section 5 is "a positive grant of legislative power" to Congress); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[t]he fundamental concept of liberty embodied in [the Due Process Clause of the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment."). Congress may also abrogate state sovereign immunity under the Eleventh Amendment and authorize suits for damages through a valid exercise of its Section 5 power. *See Nevada Dep't Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003).

The first step in determining the constitutionality of Congress' use of its enforcement powers is "to identify with some precision the scope of the constitutional right at issue." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). Section 2000cc(a)(2)(C) of RLUIPA protects the free exercise of religion from land use regulations, enforced on the basis of individual assessments, that impose substantial burdens on free exercise and are

not narrowly tailored to satisfy a compelling government interest. *See* 42 U.S.C. §§ 2000cc(a)(1)(A)-(B); *see also Guru Nank Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 993 (9th Cir. 2006) (identifying precise right as "the free exercise of religion in the face of individualized governmental assessments subject to strict scrutiny."). Congress has appropriately exercised its authority under Section 5 of the Fourteenth Amendment to protect this right because it has identified widespread violations of these rights and RLUIPA is a congruent and proportional response to that discrimination.

A. Congress Has Identified A History And Pattern Of Unconstitutional Conduct Through Discriminatory Land Use Regulations That Inhibit The Free Exercise Of Religion.

The congressional record supporting the land use provisions of RLUIPA sets forth statistical data and anecdotal evidence detailing the pervasive discrimination that religious institutions are subject to in the context of land use regulations. As part of the inquiry into whether Congress has properly exercised its Section 5 authority, this Court has considered "whether Congress identified a history and pattern of unconstitutional [regulation] by the States against [religious groups]." *Garrett*, 531 U.S. at 368. *Compare South Carolina v. Katzenbach*, 383 U.S. at 334 (recognizing detailed legislative record compiling discrimination in voting rights cases) *with City of Boerne*, 521 U.S. at 530 ("RFRA's legislative

record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

RLUIPA's legislative record includes "massive evidence" of widespread religious discrimination caused by land use regulations that frustrate religious exercise. *See Joint Statement*, 146 Cong. Rec. at S7774; H.R. Rep. No. 106-219, at 17. Congress accumulated evidence of land use regulations that excluded all new churches from an entire city, required religious (but not secular) institutions to obtain special building permits, and excessively impacted new churches and unfamiliar religions. *See* H.R. Rep. No. 106-219, at 19; *see also Joint Statement*, 146 Cong. Rec. at S7774. The House Report also includes the summary of a zoning expert's testimony that under twelve of twenty-nine zoning codes surveyed in suburban Chicago, religious institutions could not build houses of worship without obtaining a special use permit, which could be arbitrarily denied. *See* H.R. Rep. No 106-219, at 19.

Congress recognized that the discretionary power of government officials to regulate land use leads to discrimination that makes it extremely difficult for religious assemblies to open houses of worship. *See* H.R. Rep. No. 106-219, at 18; *Joint Statement*, 146 Cong. Rec. at S7774. Decision-making based on particular facts, rather than a general rule, formed a common thread in many reports of discrimination. *See* H.R. Rep. No. 106-219,

at 21. Witness testimony confirmed the pervasive nature of the discrimination, including accounts of re-zoning to prevent houses of worship from being built and the revocation of permits after construction was underway. *See id.* at 20-21.

This record evidences a history and pattern of land use regulations that unconstitutionally inhibit the free exercise of religion. *See Garrett*, 531 U.S. at 368.

B. The Scope Of The Right RLUIPA Defined In Section 2000cc(a)(2)(C) Is Congruent And Proportional To The Discrimination That Congress Has Identified.

RLUIPA is a permissive use of Congress's remedial authority because it does not alter the scope of any existing constitutional right, rather it enforces constitutional violations identified in this Court's Free Exercise Clause jurisprudence.

Congress's use of its remedial authority to enforce existing constitutional rights must demonstrate "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. RLUIPA is a congruent and proportional exercise of congressional authority because it satisfies the constitutional standards set forth in this Court's prior rulings. In *Employment Division v. Smith*, this Court held that the government need not

offer a compelling interest to justify neutral laws of general applicability that incidentally impact religion. 494 U.S. 872, 888-89 (1990). However, that decision also clarified that where the government has a regulatory system that grants discretionary exemptions, there must be a compelling reason to deny an exemption if such denial results in a substantial burden on the free exercise of religion. *See id. at 884*; *see also Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963). In addition, this Court has instructed that facially neutral laws that improperly target religion are subject to strict scrutiny when they violate principles of neutrality and are not generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

Section 2000cc(a)(2)(C) applies to land use regulations, a regime under which the government makes individual assessments, and prohibits the imposition of a substantial burden on free exercise unless such result is justified by a compelling interest and narrowly tailored to achieve that interest. *See* 42 U.S.C. § 2000cc(a)(2)(C); *Freedom Baptist*, 204 F. Supp. 2d at 868 (recognizing that "zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations."). Accordingly, the constitutional protection afforded in this section mirrors the scope of the rights protected in *Sherbert*, *Smith*, and

Lukumi. *See Lukumi*, 508 U.S. 542; *see also Smith*, 494 U.S. at 890; *Sherbert*, 374 U.S. at 403; *see also Freedom Baptist*, 204 F. Supp. 2d at 868 ("What Congress manifestly has done in this subsection is to codify the individualized assessment jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner*."); H.R. Rep. No. 106-219, at 17 (pointing out that individualized assessment portion of statute reflects Court's teachings in *Smith*); *Joint Statement*, 146 Cong. Rec. at S7775 ("Each subsection closely tracks the legal standards in one or more Supreme Court opinions.").

In addition to the congruence between the right that Congress has identified and the constitutional rights this Court has recognized, section 2000cc(a) is a proportional response to the problems that Congress has acknowledged. On the whole, the provisions of RLUIPA do not amount to "[s]weeping coverage." *See City of Boerne*, 521 U.S. at 532. RLUIPA deals with violations of constitutional rights only in the context of land use regulations and institutionalized persons and does not have the effect of "displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* RLUIPA remedies constitutional violations in areas where discrimination has been the most flagrant – in the context of land use regulations and institutionalized persons. *See, e.g.*, *id.*; *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (allowing congressional use of enforcement power in context of voting rights because statute affected discrete class of state laws);

Guru, 456 F.3d at 994-95 ("RLUIPA is a congruent and proportional response to free exercise violations because it targets only regulations that are susceptible, and have been shown, to violate individuals' religious exercise."); H.R. Rep. No. 106-216, at 17 (finding that statute "operates as precisely the type of 'enforcement' that the *Boerne* Court invited.").

In light of the legislative findings regarding the widespread discrimination in the context of land use regulation and the congruent and proportional statute crafted by Congress in response, section 2000cc(a)(2)(C) functions as an appropriate exercise of Congress's Section 5 enforcement power.

III. This Court Should Clarify That RLUIPA Authorizes Litigants To Recover Compensatory Damages Against Governments And Government Actors.

RLUIPA provides that violations of the Act entitle litigants to file suit against governments to recover "appropriate relief," including damages. *See* 42 U.S.C. § 2000cc-2(a). Furthermore, individuals "acting under color of State law" are subjected to liability. 42 U.S.C. § 2000cc-5(4)(A)(iii).

Congress intended this provision to grant prevailing parties the right to recover damages, and this Court's "general rule" is to interpret the term "appropriate relief" to include damages unless otherwise directed by Congress. *See* H.R. Rep. No.

106-219, at 29 (1999) (stating that RLUIPA creates "a private cause of action for damages, injunction and declaratory judgment"); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66-70 (1992) (reinforcing the "the traditional presumption in favor of all appropriate relief"); *see also Smith v. Allen*, 502 F.3d 1255, 1269-71 (11th Cir. 2007) (concluding that "the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief").

As a result, and pursuant to a valid exercise of Congress's Commerce Clause and Section 5 authority, litigants may recover compensatory damages against governments and individual government actors for violations of RLUIPA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Jason P. Gosselin
Vincent E. Gentile
Matthew S. Barndt
DRINKER BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103-6996
(215) 988-2700

PETITIONER'S BRIEF

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IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

584 67

QUESTION PRESENTED

Whether an individual may sue a state or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*

PARTIES TO THE PROCEEDINGS

Petitioner is Harvey Leroy Sossamon, III, an inmate in the Robertson Unit of the Texas Department of Criminal Justice.

Respondents are the State of Texas; Christina Melton Crain, Chairman, Texas Criminal Justice Board; Cathy Clement, Assistant Director, Texas Department of Criminal Justice, Correctional Institution Division Region VI; Brad Livingston, Executive Director, Texas Department of Criminal Justice; Doug Dretke, Executive Director, Correctional Institutional Division; Senior Warden Robert Eason, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division.*

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* The caption in the court of appeals erroneously included three other defendants who have been dismissed from this action. *See* Pet. App. 4a n.2.

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BRIEF FOR THE PETITIONER

Petitioner Harvey Leroy Sossamon, III, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 560 F.3d 316. The district court's opinion (Pet. App. 36a-57a) is unpublished.

JURISDICTION

The court of appeals entered judgment on February 17, 2009. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on May 18, 2009, which this Court granted on May 24, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Spending Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 1, provides, in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .

II. Statutory Provisions

The relevant provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, are reproduced in a statutory appendix to this brief.

STATEMENT OF THE CASE

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, is a civil rights law designed to protect against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion in two specific contexts. Section 2 of the Act applies to land use regulation. *See id.* § 2000cc. Section 3, the provision at issue in this case, protects the free exercise of religion by persons in federally funded state institutions. *See id.* § 2000cc-1.

Section 3 directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," *id.* § 2000cc-1(a), unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest,

id. §§ 2000cc-1(a)(1), (2). RLUIPA defines "government" to include a "State" or a state "official." *Id.* § 2000cc-5(4)(A). "[R]eligious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

Congress enacted these provisions in response to substantial evidence, collected during three years of hearings, showing that persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities face religious discrimination and "'frivolous or arbitrary' barriers" to their religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citation omitted). Congress found that religious discrimination and unequal treatment in such institutions was commonplace, ranging from practices like permitting the lighting of votive candles but not Chanukah candles,[1] to banning Protestants from possessing crosses "without the ghost of a reason," while allowing others to wear crosses if attached to a rosary.[2]

In other cases, institutions refused to make reasonable modifications to procedures that would allow individuals to practice the basic tenets of their faiths, even though the accommodation would not

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[1] *Protecting Religious Freedom After* Boerne v. Flores: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 41 (1998) (*Post-Boerne Hearing*) (statement of Isaac Jaroslawicz).

[2] *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698, 16,699 (2000) (*Joint Statement*).

interfere with security or any other significant governmental interest. Examples included the taping of confessions between priest and penitent, prohibiting prisoners from missing meals on religious fast days, and refusing to distribute donated unleavened bread to Jewish inmates during Passover.[3]

Wanting to prevent federal funding from contributing to such discriminatory and unreasoned burdens on religious exercise, Congress invoked its Spending Clause authority, U.S. CONST. art. I, § 8, cl. 1, to require compliance with RLUIPA's heightened statutory protection for religious exercise in any "program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).

To ensure effective enforcement of the Act, Congress created an express private right of action, authorizing individuals to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a) (emphasis added). In the same provision, Congress authorized enforcement actions by the federal government, but only for "injunctive or declaratory relief." *Id.* § 2000cc-2(f).

2. Petitioner is an inmate at the Robertson Unit of the Texas Department of Criminal Justice Correction Institutions Division. In 2006, he filed suit in the U.S. District Court for the Western District of Texas against the State of Texas and

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[3] See *Joint Statement* at 16,699; 146 Cong. Rec. 14,284 (2000) (statement of Sen. Hatch), *Post-Boerne Hearing* at 43 (statement of Isaac Jaroslawicz)

various prison officials in their official capacities alleging, among other things, violations of RLUIPA. Pet. App. 36a-37a.[4]

Petitioner challenged two practices at the prison. First, he alleged that the prison violated RLUIPA by precluding inmates in disciplinary confinement from leaving their cells to attend religious services, even though they were allowed to "attend educational classes, to use the law library, and to participate in other secular activities." Pet. App. 3a.

Second, petitioner challenged a rule barring inmates from using the prison chapel for religious services under any circumstances – even when not on cell restriction – while allowing the chapel to be used for non-religious purposes, including "weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates." Pet. App. 30a. Inmates were also allowed to use the chaplain's office at night to make phone calls, but nonetheless could not enter the chapel to worship or pray. Pet. App. 8a. Instead, inmates were relegated to attending worship services in a "multi-purpose room," Pet. App. 38a, which lacked "Christian symbols or furnishings, such as an altar and cross, which have special significance and meaning to Christians." Pet. App. 2a-3a (internal quotation marks omitted). Petitioner was thus prevented from engaging in basic aspects of Christian worship, such as kneeling at an

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[4] Petitioner also sued the officials in their individual capacities, and alleged federal constitutional and state statutory violations. Pet. App. 4a-5a. Those claims are not at issue in this Court.

altar or receiving Holy Communion in view of a cross. Pet. App. 3a.

Petitioner's complaint sought declaratory and injunctive relief, as well as compensatory and punitive damages. Pet. App. 5a. The district court granted the State's motion for summary judgment, holding, as relevant here, that Texas's sovereign immunity barred damages claims against the state or its officers in their official capacities. Pet. App. 55a, 57a.

3. The Fifth Circuit affirmed in part and reversed in part. Pet. App. 35a.

The court of appeals accepted that RLUIPA provides an express cause of action for "appropriate relief" against states and state officials in their official capacities. Pet. App. 16a-17a. It further noted that "appropriate relief" ordinarily includes damages. Pet. App. 16a n.26. Referring to this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Fifth Circuit explained that "the Supreme Court has instructed us to 'presume the availability of all appropriate remedies unless Congress has clearly indicated otherwise' or given guidance by a 'clear indication of its purpose with respect to remedies.'" Pet. App. 16a n.26 (quoting *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (citing *Franklin*, 503 U.S. at 68-69)). And in this case, the court of appeals observed, "[t]here is no clear or express indication in RLUIPA that damages are unrecoverable." Pet. App. 16a n.26.

Nonetheless, the court ruled that even if "RLUIPA creates such a cause of action, it is barred by Texas's sovereign immunity." Pet. App. 20a.

"When deciding the validity of a putative waiver of sovereign immunity through a state's participation in a Spending Clause 'contract,'" the court stated, "we ask whether Congress spoke with sufficient clarity to put the state on notice that to accept federal funds, the state must also accept liability for money damages." Pet. App. 21a (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The court accepted that the phrase "appropriate relief" unambiguously includes injunctive and declaratory relief. Pet. App. 14a. The court further acknowledged that under this Court's decision in *Franklin*, the phrase "appropriate relief" ordinarily encompasses damages. Pet. App. 23a. The court concluded, however, that the *Franklin* rule of construction "disappear[s] when we must interpret an ambiguous provision against the backdrop of a state's sovereign immunity." Pet. App. 23a. Accordingly, the court held that although "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis," it was "not clear enough" to overcome "state sovereign immunity from suits for monetary relief." Pet. App. 23a.

Applying that holding to this case, the Court affirmed the district court's entry of summary judgment against petitioner's claims for damages. The court further held that petitioner's request for an injunction against the prison's cell-restriction policy had been mooted by the State's post-litigation abandonment of that practice. Pet. App. 9a-13a. However, the court found that "there are genuine issues of material fact about [petitioner's] entitlement to declaratory and injunctive relief from Texas's chapel-use policy." Pet. App. 24a. As a result, the

court remanded the case for further proceedings on that claim.

4. This Court granted certiorari limited to the question whether damages are available under RLUIPA against a state or state officials in their official capacities. 130 S. Ct. 3319 (2010).

SUMMARY OF ARGUMENT

Texas does not dispute that in accepting federal funds for its prisons, it waived its sovereign immunity to private suits for "appropriate relief" under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.* Having been sued for violating the statute, the State now complains that it was not on notice that the suits to which it agreed would include claims for money damages. That complaint is unfounded.

First, in this context, the phrase "appropriate relief" has an established meaning in the law, one that unambiguously encompasses damages. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court used that phrase as a term of art to describe the remedies available under a number of the nation's foremost civil rights statutes prohibiting discrimination in federally funded programs. And in those cases, this Court made clear that compensatory damages are the quintessentially "appropriate relief" for the violation of individuals' statutory civil rights.

In fact, the Court's decision in *Barnes* establishes that even if RLUIPA said nothing about available remedies, Texas nonetheless would have been "on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but

also to those remedies traditionally available in suits for breach of contract," including "compensatory damages." 536 U.S. at 187.

That Congress intended this result is confirmed by other aspects of RLUIPA's text and by legal tradition. For example, elsewhere in the Act, Congress provided a right of action for the federal government, but only for injunctive and declaratory relief. Texas could not have reasonably believed that the two enforcement provisions, using dramatically different language, nonetheless authorized the same, limited equitable relief. Nor would such a statute bear any resemblance to other major civil rights statutes, which provide for damages remedies. And there is nothing in RLUIPA indicating that Congress intended to treat religious liberty as a second-class civil right, unworthy of the full remedial protection afforded victims of other forms of discrimination proscribed by federal statute.

In light of all this, the State appears to concede that city jails and county correctional facilities are on notice that when they accept federal funds, they are subject to damages suits under RLUIPA. The State nonetheless contends that what is clear enough for local governments is not clear enough for a state. That assertion has no basis in this Court's cases. Although only states are protected by sovereign immunity, local governments and private individuals are also entitled to unambiguous notice of the conditions attached to federal financing. And this Court has applied the same clear notice rule – derived from *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) – to all Spending Clause conditions, including conditions requiring

waivers of sovereign immunity. That is perfectly sensible. So long as a state is on notice of the consequences of its actions – even when the consequences are made clear in part by a decision of this Court, like *Barnes* – the state is able to make informed decisions about the costs and benefits of accepting federal funding and be held accountable for those choices by its citizens.

This Court's decisions regarding waivers of federal sovereign immunity support that conclusion. The Court has required a clear indication that Congress has consented to a damages remedy against the federal government. But it has not required Congress to express that consent through any particular formulation, or prohibited courts from construing statutory language in the light of legal tradition. For example, the Court has construed a federal statute authorizing "appropriate remedies" in administrative proceedings against federal agencies charged with employment discrimination to permit damage awards. Likewise, consistent with *Barnes*, this Court has held that by consenting to breach of contract suits, the United States has consented to traditional contract damages remedies, even though no statute expressly authorizes that relief.

Second, Congress provided the State additional notice of its amenability to RLUIPA damages actions in the Rehabilitation Act Amendments of 1986, which provides that states accepting federal funding waive immunity to damages actions otherwise available against non-state defendants under any "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7. RLUIPA plainly falls within that description. While

the State focuses on the fact that RLUIPA requires accommodations to religious practices, it ignores that the statute also prohibits the most familiar forms of religious discrimination, such as allowing Catholics but not Protestants to wear crosses in a jail, or as in this case, allowing inmates out of segregation for secular, but not comparable religious, purposes. Moreover, the accommodation requirement is itself a well-recognized form of antidiscrimination mandate, found in a number of prominent civil rights statutes, including the Rehabilitation Act (which is specifically enumerated as an antidiscrimination statute covered by Section 2000d-7) and Title VII (which defines failure to accommodate the religious beliefs of employees without adequate justification as a form of unlawful discrimination on the basis of religion).

ARGUMENT

Every year since the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, the State of Texas has accepted millions of dollars from the federal government for its prisons. It is undisputed that in doing so, Texas waived its sovereign immunity to private suits for "appropriate relief" under RLUIPA. *See, e.g., College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 n.2, 686 (1999) (confirming that a state's acceptance of funds clearly conditioned on a state's submission to private litigation waives the state's sovereign immunity); *see also Alden v. Maine*, 527 U.S. 706, 755 (1999) (same); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (same). The court of appeals nonetheless held that Texas lacked adequate notice that the suits for "appropriate relief" would include claims for money damages. That conclusion is doubly wrong.

First, the "appropriate relief" language of RLUIPA – read in the context of the broader statute, legal tradition, and this Court's cases – provided the State unambiguous notice of its amenability to a damages remedy, enabling it "to exercise [its] choice knowingly, cognizant of the consequences of [its] participation" in federal spending programs. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Second, the Civil Rights Remedies Equalization provision of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, separately notified Texas in unmistakable terms that its

acceptance of federal funds would subject it to the same damages remedy available against non-state defendants.

I. RLUIPA Unambiguously Conditions Receipt Of Federal Funds On States' Consent To Damages Actions.

While it is true that a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192 (1996), the "sovereign immunity canon is just that – a canon of construction," *Richlin Security Svc. Co. v. Chertoff*, 128 S. Ct. 2007, 2019 (2008). "It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Id.* Thus, when ordinary means of statutory interpretation eliminate any alleged ambiguity, the strict construction canon has no role to play, *id.*, and instead the waiver of immunity will be given the full scope Congress intended. *See, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) ("[W]e must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively.") (citations and internal quotation marks omitted).

In this case, ordinary tools of statutory construction make plain that the "appropriate relief" to which the State consented includes compensatory damages.

A. The Term "Appropriate Relief" Has An Established Meaning In This Court's Cases, One That Clearly Includes Money Damages.

As Justice Frankfurter once observed, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)). Consequently, where terms employed in a statute have "accumulated settled meaning," a "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (internal quotation marks omitted). Here, the phrase "appropriate relief" has an established meaning in the law – one that unambiguously includes damages – when referring to the remedies available in a private right of action to enforce a Spending Clause civil rights statute.

1. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court considered the proper remedies for a violation of Title IX of the Education Act Amendments of 1972, 42 U.S.C. §§ 1681 *et seq.*, a Spending Clause statute with an implied private right of action. Although the statute did not expressly address available remedies, this Court confirmed the "general rule," based on more than a century of precedent, that "absent clear direction to the contrary by Congress, the federal courts have the power to award any *appropriate relief*

in a cognizable cause of action brought pursuant to a federal statute," 503 U.S. at 70-71 (emphasis added), including damages, *id.* at 75-76.[5]

The Court reaffirmed that damages are appropriate relief for the violation of Spending Clause civil rights statutes in *Barnes v. Gorman*, 536 U.S. 181 (2002). In that case, this Court considered the remedies available under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Both statutes provide an express private right of action that incorporates by reference the remedies available under Title IX. *See* 536 U.S. at 185.[6] As a result, the Court explained, *Franklin* dictated that both statutes be construed to authorize suits for "appropriate relief," including damages. *Id.* Treating compensatory damages as "appropriate relief" made sense, the Court explained, because Spending Clause legislation operates "much in the nature of a *contract*." 536 U.S. at 186 (quoting

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[5] The Court explained that this interpretive principle "has deep roots in our jurisprudence." 503 U.S. at 66; *see id.* at 66-68 (discussing origins of tradition).

[6] Title II of the ADA expressly incorporates the remedies of the Rehabilitation Act. 42 U.S.C. § 12133. The Rehabilitation Act, in turn, expressly incorporates the remedies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* *See* 29 U.S.C. § 794a(a)(2). Title VI has no express private right of action, but the Court has "interpreted Title IX consistently with Title VI." *Barnes*, 536 U.S. at 185. Consequently, the Court treated the remedies available under Title VI, Section 504, and Title II of the ADA as governed by the Court's Title IX decision in *Franklin*. *Id.*

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)) (emphasis in original). Because the legitimacy of Spending Clause legislation turns on recipients' voluntary acceptance of the funding condition, Congress must make the consequences of accepting federal funds unambiguous. *Id.* (citing *Pennhurst*, 451 U.S. at 17). That includes, the Court held, putting recipients on notice of the remedies available in a private suit under the statute. *Id.* at 187. Accordingly, "a remedy is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (citation omitted) (emphasis in original).

As in *Franklin*, generations of legal practice provided the required notice, even in the absence of a specific enumeration of remedies in the text of the statutes. The Court held that a "funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* Those remedies include, the Court observed, both "compensatory damages" and injunctions (but not punitive damages). 536 U.S. at 187.

2. In *Barnes* and *Franklin*, this Court concluded that damages were "appropriate" relief even under a statute that made no mention of remedies. It should come as little surprise, then, that when the Congress *has* expressly authorized private actions for "appropriate" relief, this Court has construed that authorization to permit an award of compensatory damages as well, even against a sovereign.

For example, in *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Hardeman*, 401 U.S. 233 (1971), this Court held that in authorizing "such relief (including injunctions) as may be appropriate," to remedy a violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412, Congress had provided a damages remedy in addition to any right to injunctive or declaratory relief. *Id.* at 239-40. "If anything," the Court observed, the provision "contemplates that damages will be the usual, and injunctions the extraordinary form of relief." *Id.*

Likewise, in *West v. Gibson*, 527 U.S. 212 (1999), this Court held that a statutory phrase nearly identical to RLUIPA's "appropriate relief" encompassed compensatory damages clearly enough to overcome any sovereign immunity canon of strict construction. As originally enacted, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibited employment discrimination on the basis of race, sex, and religion, but only in the private sector. In 1972, Congress extended Title VII's prohibitions to the federal government. 42 U.S.C. § 2000e-16(a). Congress gave the Equal Employment Opportunity Commission authority to enforce the new provisions against federal agencies "through *appropriate remedies*." *Id.* § 2000e-16(b) (emphasis added). This Court ruled in *West* that this provision waived the United States' sovereign immunity from damages even though the statute did not "explicitly refer to compensatory damages" claims. *Id.* at 217. Given the language Congress used, the statute's purpose and history, and Congress's express provision of a

damages remedy against all defendants in litigation, the Court held that Congress spoke with sufficient clarity to meet any "specially strict standard" for finding a waiver of sovereign immunity. *Id.*[7]

3. That "appropriate relief" means the same thing in RLUIPA is confirmed by Congress's long tradition of authorizing damages for violations of civil rights statutes. In *Barnes*, this Court held that damages are available under Title IX, Title VI, Section 504 of the Rehabilitation Act, and Title II of the ADA. 536 U.S. at 185. Congress likewise has authorized monetary relief under the Age Discrimination in Employment Act,[8] the Fair Housing Act,[9] the Equal Credit Opportunity Act,[10] and the Equal Pay Act.[11] Of particular note, Congress has also allowed damages actions to enforce Title VII's bar on religious discrimination in employment,[12] including the failure to provide reasonable accommodations for employees' religious practices.[13]

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[7] That *West* involved a waiver of the United States' sovereign immunity, rather than a state's, is of no moment. As respondents note (BIO 13), this Court's federal waiver decisions inform the resolution of state sovereign immunity questions. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998).

[8] 29 U.S.C. § 633a(c).

[9] 42 U.S.C. § 3613(c)(1).

[10] 15 U.S.C. § 1691e(a).

[11] 29 U.S.C. §§ 206(d)(3), 216(b).

[12] 42 U.S.C. § 1981a(a).

[13] 42 U.S.C. §§ 2000e(j), 2000e-2(a)(2).

There was no basis for Texas to think that Congress would have intended to treat states differently under RLUIPA. To the contrary, Congress has repeatedly subjected states to damages remedies under civil rights statutes. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (Title II of the ADA); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the ADA); *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000) (ADEA); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII); *see also* 42 U.S.C. § 2000d-7 (confirming that states are subject to suit for damages under Title VI, Title IX, Section 504, and the Age Discrimination Act, 42 U.S.C. §§ 6101 *et seq.*). Indeed, it is difficult to find a modern civil rights statute made applicable to the states that does not include a damages remedy.

4. In light of this tradition and the Court's prior precedents, the court of appeals erred in concluding that RLUIPA's authorization of "appropriate relief" was insufficient to put states on notice that accepting federal funds would subject them to suit for damages under the Act.

First, this Court's decision in *West* belies the court of appeals' conclusion (Pet. App. 23a) that a phrase like "appropriate relief" is too inherently ambiguous to satisfy a sovereign immunity clear statement rule. To the contrary, *West* demonstrates that RLUIPA's language must be construed in legal context. In this case, legal tradition shows that if "appropriate relief" means anything, it includes money damages, *see Int'l Bhd. of Boilermakers*, 401 U.S. at 239-40, especially in the context of civil rights statutes enacted under the Spending Clause, *see Barnes*, 536 U.S. at 187.

Second, had RLUIPA said nothing about available remedies, *Barnes* would hold that that a damages remedy is available and that Texas was on notice of that remedy at the time it accepted federal funding. 536 U.S. at 187.

Third, even if the State were right that *Barnes* does not apply to a state funding recipient – which is is incorrect, *see infra* Section I(C) – that would not matter. When Congress uses a term of art in a statute – even when that term is borrowed from an otherwise inapplicable line of cases or area of the law – that term carries its established meaning into the new statute. *See, e.g.*, *Neder*, 527 U.S. at 21; *Evans*, 504 U.S. at 260 n.3; *United States v. Merriam*, 263 U.S. 179, 187 (1923). In this case, the phrase "appropriate relief" is obviously transplanted from *Franklin*, which used it repeatedly as a term of art to describe the scope of available relief under a Spending Clause statute. See 503 U.S. at 66, 68, 69, 70-71, 73, 74; *see also Barnes*, 536 U.S. at 184, 185, 187 (same). At the same time, RLUIPA is transparently modeled on the Spending Clause statutes construed in *Barnes* and *Franklin*.[14] Texas therefore had every reason to know that the same term, used in the same context, would bear the same meaning.

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[14] *See* 42 U.S.C. § 2000cc-1(b)(1) (applying RLUIPA's requirements to any "program or activity that receives Federal financial assistance"); *id.* § 2000cc-5(6) (incorporating by reference Title VI's definition of "program or activity"); *see also Joint Statement* at 16,699 ("The Spending Clause provisions are modeled directly on similar provisions of other civil rights laws.")

Fourth, the court of appeals' decision creates a seriously anomalous statute. For one thing, in assuming that injunctions are "appropriate relief," but damages are not, the court reversed the ordinary rules governing the relationship between legal and equitable remedies. Because an "injunction is a drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010), "it is axiomatic that a court should determine the adequacy of a remedy at law before resorting to equitable relief." *Franklin*, 503 U.S. at 75-76. The court of appeals' abandonment of the usual understanding of when an injunction is "appropriate relief" is particularly unwarranted here because when Congress wanted to limit RLUIPA plaintiffs to equitable relief, it did so expressly, using very different language. In Section 2000cc-2(f), Congress authorized the federal government to "bring an action for injunctive or declaratory relief." Congress would not have authorized the same relief, using entirely different language, for private litigants. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (citation omitted). The stark contrast in language underscored for states that private actions for "appropriate relief" encompassed more than the "injunctive or declaratory relief" made available to the federal government.

The decision below also leads to the untenable conclusion that the meaning of the single phrase "appropriate relief" changes significantly depending on nothing more than the identity of the defendant.

Under the court of appeals' holding, if the defendant is a state, "appropriate relief" means only injunctive and declaratory relief. Yet both the court of appeals and the State appear to acknowledge that under *Barnes*, if the defendant is a county or municipality, the same language in the same phrase of the same provision of the statute would encompass damages as well. *See* Pet. App. 23a; BIO 13. That is not how Congress writes statutes, or this Court construes them. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) (refusing to "giv[e] the *same* [statutory] provision a different meaning" for different parties, even though the parties' different legal statuses raised different constitutional concerns) (emphasis in original). To the contrary, where Congress intended RLUIPA to afford different relief depending on the identity of a party, it created a separate cause of action with its own separate list of remedies. *See* 42 U.S.C. § 2000cc-2(f) (separately defining relief available in suits by the Attorney General).

B. Everything Else In The Text, History, And Purposes Of The Statute Supports The Conclusion That "Appropriate Relief" Includes Damages.

RLUIPA as a whole confirms that "appropriate relief" means exactly what this Court has long said it means.

First, RLUIPA's reference to the Prison Litigation Reform Act (PLRA) supports the conclusion that Congress meant "appropriate relief" to include damages. In RLUIPA, Congress expressly provided that "nothing in this [statute] shall be construed to amend or repeal the Prison Litigation

Reform Act of 1995." 42 U.S.C. § 2000cc-2(e). As the State has noted, a principal purpose of the PLRA was to limit compensatory damage awards to prisoners. *See* BIO 4-5. If RLUIPA authorized only injunctive and declaratory relief, its reference to the PLRA would have been largely pointless.

Second, Congress foreclosed the court of appeals' unprecedentedly cramped reading of "appropriate relief" by instructing that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

Third, as in *West*, an examination of the purposes of the statute confirms that the normal understanding of "appropriate relief" is the correct one. *See* 527 U.S. at 218. Congress enacted RLUIPA because it concluded, after extensive legislative study and hearings, that freedom from religious discrimination and the right to free exercise deserved the same statutory protection afforded other basic civil rights. The legislative history and findings defy any argument that Congress intended RLUIPA to create a second-class civil right. Nor is there any evidence that Congress believed that victims of RLUIPA violations were less deserving of the law's longstanding tradition of make-whole remedies.

To be sure, RLUIPA applies to state correctional institutions, a sensitive context. But Congress fully considered and carefully balanced the important state interests involved, particularly by retaining the limitations on remedies in the Prison Litigation Reform Act. *See Cutter v. Wilkinson*, 544 U.S. 709, 722-23, 725-26 (2005). In any case, concerns about

the prison environment cannot drive construction of RLUIPA's remedial provision, which applies equally to all individuals protected by RLUIPA, including landowners and people in government-run nursing homes, mental health facilities, and group homes. *See* 42 U.S.C. §§ 1997, 2000cc-1.

In all of these settings, failing to provide a damages remedy would have significantly undermined the statute's effectiveness. *See, e.g.*, Brief of ACLU *et al.* § I(B). Claims for injunctive relief are easily, and frequently, mooted in the institutional and zoning contexts, not only by the cessation of the allegedly illegal conduct (as happened in this case, *see* Pet. App. 9a-13a),[15] but also by victims' release from custody or transfer to another facility.[16] Indeed, one of the reasons this Court held in *Franklin* that "appropriate relief" extends beyond equitable remedies is that often "prospective relief accords [the victim] no remedy at all." 503 U.S. at 76. Congress knew that concern would apply with particular force to land use and institutional cases. In fact, courts that have refused to recognize a damages remedy under RLUIPA have acknowledged that, as a consequence, in many cases the "appropriate relief" the statute authorizes against all defendants, in practice amounts to no relief at

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[15] *See also, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260-61 (3d Cir. 2007) (land use claim for injunctive relief mooted by change in defendant's zoning rules).

[16] *See, e.g., Cardinal v. Metrish*, 564 F.3d 794, 798-99 (6th Cir. 2008), *cert. pending*, No. 09-109; cases cited in n.17, *infra*.

all.[17] That is not what Congress passed RLUIPA to accomplish.

C. The Rule That Funding Recipients Are On Notice That Appropriate Relief Includes Damages Applies To States.

Both the court of appeals and the State appear to acknowledge that if applicable, the Court's decisions in *Franklin* and *Barnes* would compel the conclusion that RLUIPA's "appropriate relief" includes damages. *See* Pet. App. 23a; BIO 13. But both suggest that those decisions are incompatible with the clear statement rule this Court applies to waivers of sovereign immunity. As an initial matter, this argument is ultimately insufficient to sustain the judgment below. As already noted, even if *Franklin* and *Barnes* did not apply of their own force, Congress incorporated their definition of "appropriate relief" as surely as if it had expressly provided that the "remedies set forth in Title IX shall be available for violations of RLUIPA." *See supra* at 25. But in any case, the rule of *Franklin* and *Barnes* does apply to states.

1. The court of appeals reasoned that the *Franklin* presumption in favor of the availability of damages was incompatible with the *Pennhurst* clear statement rule, which requires that Congress speak

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[17] *See, e.g.*, *Nelson v. Miller*, 570 F.3d 868, 883, 885 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *Cardinal*, 564 F.3d at 798-801; *Berryman v. Granholm*, 343 Fed. Appx. 1, 3-4 (6th Cir. 2009); *Harris v. Schriro*, 652 F. Supp. 2d 1024, 1028-33 (D. Ariz. 2009).

"with sufficient clarity to put the state on notice that, to accept federal funds, the state must also accept liability for monetary damages." Pet. App. 21a (citing *Pennhurst*, 451 U.S. at 17); *see also* Pet. App. 21a-23a.

But this Court considered – and rejected – that very assertion in *Franklin* itself. In that case, the school district and the United States as amicus asserted that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress's Spending Clause power." 503 U.S. at 74. The Court acknowledged that the "point" of the *Pennhurst* rule is to ensure that a funding recipient will have "notice that it will be liable for a monetary award." *Id.* (citing *Pennhurst*, 451 U.S. at 17). But the "notice problem" addressed in *Pennhurst* "does not arise in a case such as this," the Court concluded. *Id.* at 74-75.

The Court elaborated on that conclusion in *Barnes*. There, the Court expressly recognized that any remedy provided under a Spending Clause statute must be consistent with the *Pennhurst* clear statement rule, acknowledging that "a remedy is 'appropriate relief,' . . . only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." 536 U.S. at 187; *see also id.* at 186 (quoting *Pennhurst* on clear statement standard). Of course, in *Barnes*, none of the relevant statutes expressly identified what kinds of relief were available. At best, the ADA and Section 504 could be read as incorporating by reference the "appropriate relief" remedy implied by *Franklin* into Title IX, putting those statutes on the same footing as RLUIPA. Nonetheless, that did not lead this

Court to conclude that *Pennhurst* precluded an award of damages. Instead, the Court reconciled the *Franklin* presumption with the *Pennhurst* clear statement rule by announcing that because "Spending Clause legislation [is] 'much in the nature of a contract,'" a "funding recipient is generally *on notice* that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including compensatory damages. 536 U.S. at 187 (quoting *Pennhurst*, 451 U.S. at 17).

2. The State points out that neither *Franklin* nor *Barnes* involved state defendants entitled to sovereign immunity. BIO 13-14. That might be a compelling point if the clear statement rule applied in those cases was less strict than the clear statement rule applied to waivers of sovereign immunity. But, in fact, the standards are the same.

In *College Savings Bank* and *Alden v. Maine*, this Court recognized that Congress has "the authority [and] means to seek the States' voluntary consent to private suits," *Alden*, 527 U.S. at 755, pointing to the Court's prior decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). *See Alden*, 527 U.S. at 755; *College Sav. Bank*, 527 U.S. at 686-687. In *Dole*, this Court held that Congress may condition receipt of federal funding on a state's agreement to conditions Congress could not unilaterally impose through the exercise of its other enumerated powers. 483 U.S. at 207. But the Court held that this Spending Clause authority is subject to important limitations, one of which is the clear statement rule from *Pennhurst*: "if Congress desires to condition the States' receipt of

federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consquences of their participation.'" *Id.* at 207 (quoting *Pennhurst*, 451 U.S. at 17).[18]

This Court's decisions therefore judge the validity of a Spending Clause waiver under the clear statement rule of *Pennhurst*, the same standard this Court applied in *Barnes*. In fact, the court of appeals and the State have admitted as much, both citing *Pennhurst* as establishing the governing clear statement rule for Spending Clause waivers. *See* Pet. App. 21a & n.43, 22a; BIO 12, 16.

Respondents nonetheless insist that what was clear enough for local governments in *Barnes* is not clear enough for a state. But neither the State nor the court of appeals has identified any reason for this Court to establish a hierarchy of clear statement rules.[19] *Pennhurst*'s requirement that funding conditions be "unambiguous" is quite sufficient to

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[18] The other requirements are that "the exercise of the spending power must be in pursuit of 'the general welfare'"; that the condition be related to the federal interest in a particular federal project or program; and that the condition not violate any other constitutional provision. *Id.* at 207-08.

[19] To be sure, a statute conditioning federal funds on a state's amenability to suit implicates an interest protected by the Constitution. But that does not distinguish this case from *Dole*. There, the Court applied the *Pennhurst* test even though it accepted that Congress had conditioned federal highway funds on states' waiver of their sovereign right under the Twenty-First Amendment to be the sole regulators of alcohol within their borders. 483 U.S. at 205-06.

serve the purpose of this Court's sovereign immunity waiver rules, which is not to make Congress jump through verbal hoops, but to ensure that state waivers are knowing and intentional. *See, e.g.*, *College Sav. Bank*, 527 U.S. at 680.[20] When a state is on notice of the consequences of accepting federal funding, the federal structure is preserved, allowing states to make independent decisions for which they can be held politically accountable to their citizens. *See Alden*, 527 U.S. at 750-51, 755; *Bell v. N.J. & Penn.*, 461 U.S. 773, 774 (1983) (enforcing spending clause conditions "voluntarily assumed" by states "does not intrude on their sovereignty").

This is true even when the consequences of a particular course of state action are made clear in part through the decisions of this Court rather than from legislative text read in isolation. For example, in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), this Court unanimously held that a state waives its Eleventh Amendment immunity by removing to federal court state law claims for which it has waived immunity in its own courts. That principle, the court explained, was consistent similar rules established in this Court's cases, defining conduct that, as a matter of federal law, constitutes a waiver of sovereign immunity, even if the state in taking that action did

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[20] In this way, the *Pennhurst* rule conforms to the standard for waiving individual constitutional rights. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of a constitutional right requires the "intentional relinquishment or abandonment of a known right or privilege").

not intend to relinquish its immunity. *Id.* at 619. The Court rejected Georgia's argument that such rules were inconsistent with "more recent cases, which have required a 'clear' indication of the State's intent to waive its immunity.'" *Id.* at 620. Given the clarity of the judicially announced rule, it was appropriate to conclude that a state taking the specified action has consented to suit in federal court. *Id.* at 620, 623-24.

The rule recognized in *Franklin* and *Barnes* is no different. It is not too much to require states (like counties, municipalities, and private individuals) to consider the language of federal funding statutes in light of this Court's decisions. *Cf. United States v. Lanier*, 520 U.S. 259, 266 (1997) (explaining that criminal defendants' constitutional right to fair warning of the meaning of a criminal statute may be provided through judicial construction of ambiguous statutory language). Had Texas done so, it would have easily seen that it could not both accept federal funding and preserve its immunity from RLUIPA damages actions.

3. Some courts have read this Court's decision in *Lane v. Pena*, 518 U.S. 187 (1996), to imply that the *Franklin* presumption has no application in a case involving the waiver of a state's sovereign immunity. *See, e.g., Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1113 (9th Cir. 2010); *Van Wyhe v. Reisch*, 581 F.3d 639, 653-54 (8th Cir. 2009), *cert. pending*, No. 09-821; *Cardinal*, 564 F.3d at 800-01. That argument badly overreads *Lane* and ignores the Court's broader federal immunity case law, which is entirely consistent with applying the *Franklin* presumption in Spending Clause cases.

In *Lane*, this Court considered whether a federal defendant, the Merchant Marine Academy, was amenable to suit for damages under the Rehabilitation Act. It concluded that the statutory provision authorizing damages against a "Federal provider of [financial] assistance," 29 U.S.C. § 794a(a)(2), did not apply to the Academy because it did not disburse money to funding recipients. 518 U.S. at 192.[21] In the course of the decision, the Court rejected the plaintiff's reliance on *Franklin* to support a broader reading of the phrase "Federal provider." *Id.* at 196-97. Among other things, the Court explained that "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Id.* at 197.

That statement has no application here. For one thing, as shown above, RLUIPA – unlike the statute in *Lane* – uses express language with a settled meaning that includes damages. The State's notice arises from that settled meaning, even if *Franklin* itself has no application. *See supra* at 20.

More importantly, the argument ignores that *Lane* involved the United States' unilateral consent to suit, not a contracted-for waiver of immunity in

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[21] That holding is of no assistance to respondents here. There is no question that Texas is a "government" as defined under RLUIPA, 42 U.S.C. § 2000cc-2(a), or that it received federal funds for the "program or activity" in which petitioner's religious exercise was burdened, *id.* § 2000cc-1(b)(1). The statutory gap in *Lane* thus has no parallel in this case.

exchange for federal funds. *See, e.g.*, *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 278-79 (1959) (emphasizing the difference between a case in which "the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute" and one in which the waiver arises to the state's agreement to an interstate compact). *Barnes* explained that given the contractual nature of Spending Clause legislation, recipients are on notice, as a matter of law, that acceptance of federal funds subjects them to traditional contract remedies, including damages. 536 U.S. at 188. That principle is entirely reasonable, but completely inapplicable to cases in which a sovereign unilaterally waives its immunity. Parties rarely address the remedies for breach of their agreement in the body of the contract itself; rather, traditional contract remedies, which quintessentially include damages actions, apply unless the contract specifies otherwise. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (plurality) ("[D]amages are always the default remedy for breach of contract.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 346, cmt. a (1981)). Consequently, a party to a contract who agrees to submit contract disputes to litigation has consented to a damages remedy if a breach is found.

On the other hand, when a sovereign unilaterally waives its own immunity by enacting a statute, as the United States did in *Lane*, there often is no traditional damages remedy or background remedial framework that governs. But when a sovereign consents to be sued for violation of contract-like obligations, that agreement naturally and

unambiguously includes consent to submit to traditional contract remedies, including damages.

This Court's other federal immunity cases reflect this distinction. For example, in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1991), the Court addressed another unilateral waiver of federal immunity. Looking at the text of the Bankruptcy Code, the Court held that a provision waiving the Government's immunity failed to "establish unambiguously that the waiver extends to monetary claims." *Id.* at 34. There being no relevant background legal tradition to illuminate the text, the Court was left with the statutory language, which it found unclear.

In sharp contrast, the Court has long found a waiver of the federal government's immunity to damages for breach of contract even in the absence of an express statutory provision authorizing that remedy. The United States has consented to suit for breach of federal contracts through the Tucker Act, 28 U.S.C. § 1491.[22] However, the "Tucker Act itself is only a jurisdictional statute . . . and does not create a substantive right to money damages." *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 465 n.5 (1980). Nor does any other statute expressly

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[22] The Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

provide that the United States consents to a damages remedy for breach of contract. However, that has not led this Court to hold that the United States retains immunity from contract damages claims. *See id.* Instead, the longstanding legal tradition of money damages as the primary remedy for breach of contract provides the necessary clarity.

The parallel between this Court's federal contract cases and *Barnes* is obvious and important. In both contexts, a government has entered into a contract, the traditional remedy for the breach of which is money damages. Although the Court requires a clear indication that the government has agreed to submit to a damages remedy for breach of contract, the tradition of that relief in this context is so strong that the Court has had no difficulty in concluding that by agreeing to be sued for breach of the agreement, the government has necessarily, and unambiguously, submitted to that traditional remedy as well.

The distinction between unilateral waivers of sovereign immunity, on the one hand, and Spending Clause waivers, on the other, is no mere formalism. When a waiver is effected by the federal government (or a state) unilaterally subjecting itself to suit, respect for sovereign prerogatives points in a single direction, counseling the strictest plausible construction of the waiver in order to ensure that the courts do not enlarge the waiver beyond what the sovereign intended. But Spending Clause waivers implicate the important interests of *two* sovereigns – the interest of the state in deciding for itself whether to waive its immunity and the United States' equally weighty interest in ensuring that federal funds are distributed only to those recipients willing to comply

with the conditions established by Congress. The Constitution gives Congress the authority to decide under what conditions the allocation of federal funds to state programs will serve the "general welfare." U.S. CONST. art. I, § 8, cl. 1. Congress can, and often does, decide that the general welfare requires both the imposition of substantive conditions *and* the authorization of private litigation for damages in order to ensure that states adhere to those conditions. The constitutional authority to make that judgment would be frustrated by a rule that allows states to accept federal funds, while refusing to comply with conditions Congress intended, solely because Congress did not use the right words in making the conditions clear.

4. In any event, even in the context of unilateral waivers of the United States' immunity (the context of *Lane*), this Court has not required Congress to authorize damages remedies expressly in the text of the statute where, as here, legal tradition or other indicia of legislative intent make sufficiently clear Congress's willingness to submit the federal government to suits for damages.

First, as already discussed, in *West v. Gibson*, 527 U.S. 212 (1999), this Court found that language nearly identical to RLUIPA's "appropriate relief" provision waived the United States' immunity from damages claims.

Second, as also noted above, the Court's federal contracting decisions under the Tucker Act cannot be squared with any rule requiring express enumeration of remedies or any prohibition against relying on legal traditions to discern the scope of available remedies against a sovereign.

Third, the Court has also relied on tradition in other contexts to discern the scope of remedies to which the United States has consented. For example, in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), the Court considered a federal statute that directed the federal government to hold certain lands in trust for an Indian Tribe. *Id.* at 468-69. The Court explained that the terms of the United States' waiver of immunity "must be 'unequivocally expressed.'" *Id.* at 472 (citations omitted). But the Tucker Act itself made no mention of remedies. Nor did the federal statute the United States had allegedly violated. Nonetheless, the Court recognized that the statute imposed something akin to a trust law fiduciary duty. And because damages are a traditional remedy for violation of fiduciary duties, the Court held that Congress has consented to a damages action. *See id.* at 475-76; *see also United States v. Mitchell*, 463 U.S. 206, 226 (1983).[23]

In a number of other cases as well, the Court has looked beyond the bare text of a statute waiving the United States' immunity to determine the scope of the waiver. *See, e.g., Richlin Sec. Svs. Co. v. Chertoff*, 128 S. Ct. 2007, 2014-15 (2008) (in construing scope of Government's waiver of immunity to attorney's

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[23] These rulings were no aberration. The Court has recently explained that as a general matter, the source of law enforced through a Tucker Act suit "need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages." *United States v. Navajo Nation*, 129 S. Ct. 1547, 1552 (2009). It is enough that the source of law "can fairly be interpreted as mandating compensation by the Federal Government." *Id.* (citations omitted).

fees and costs, Court looked to its prior decisions addressing relief available against state and private defendants under 42 U.S.C. § 1988); *id.* at 2015 (considering arguments based on "legislative history and public policy"); *Irwin*, 498 U.S. at 95 (construing statute of limitations, a condition of the United States waiver of sovereign immunity, in light of customary availability of equitable tolling in suits between private litigants); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (looking to "long-standing fee-shifting principles" to construe scope of United States' waiver of immunity to attorney's fee awards in "appropriate" circumstances). Ordinary meaning, not magic words, is all this Court's precedent requires.

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In light of the foregoing, the court of appeals got it exactly backwards when it concluded that the rule of *Franklin* and *Barnes* "disappears" when sovereign immunity is at stake. Pet. App. 23a. To the contrary, this Court's decisions make clear that the sovereign immunity cannon comes into play only if ordinary methods of construction – like the interpretative rules this Court applied in *Barnes* – fail to resolve apparent ambiguity in the text. *See, e.g.*, *Richlin*, 128 S. Ct. at 2019. Because *Franklin* and *Barnes*, together with the broader text and legal background, render the meaning of "appropriate relief" unambiguous, it is the strict construction cannon that disappears and has no role to play in this case.

II. The Rehabilitation Remedies Act Amendments of 1986 Separately Put State Recipients On Notice That They Are Amenable To RLUIPA Suits For Damages.

Even if RLUIPA itself did not sufficiently notify states that acceptance of federal funding would constitute a waiver of sovereign immunity to RLUIPA damages suits, Congress independently provided that unambiguous notice in the Civil Rights Remedies Equalization provision of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7. *See generally* Brief of Amicus Curiae Charles E. Sisney in Support of Petitioner.

That provision states:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit

> against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a).

By its terms, this provision gives states explicit and unambiguous notice that accepting federal funds will subject them to the same remedies available against non-state defendants – including remedies "at law" (that is, damages) – for violations of a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." Contrary to the State's argument (Resp. Supp. Br. 7-8), RLUIPA is a statute "prohibiting discrimination" within the meaning of Section 2000d-7.

1. As Texas admits, Section 2 of RLUIPA expressly forbids discrimination and unequal treatment of religious organization in the land-use context. *See* Resp. Supp. Br. 8; 42 U.S.C. §§ 2000cc(b)(1)-(2). And while Section 3 does not use the word "discrimination," it nonetheless prohibits the same kind of discriminatory conduct. For example, refusing to provide an inmate kosher food because of animosity toward Jews would be a form of religious discrimination, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993), and would undoubtedly violate RLUIPA by imposing an unjustified substantial burden on the inmate's exercise of his religion. Similarly, refusing to let Quakers use the law library, or placing all Muslims in administrative segregation, would be a familiar form of religious discrimination also forbidden by RLUIPA, given that punishing inmates simply for adhering to their religious beliefs unquestionably imposes a substantial and unjustified burden on religious exercise. A prison also engages

in religious discrimination prohibited by RLUIPA when it provides accommodations for some favored religions, but not for others, or when it favors secular over equivalent religious activities without adequate justification. Here, for example, respondents allowed inmates in disciplinary confinement to leave their cells for a wide range of secular activities, but not to attend worship services. Pet. App. 3a. That policy both burdened petitioner's practice of his religion and discriminated against religious inmates.

This kind of discrimination was one of the evils RLUIPA was intended to address. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005) (noting that legislative record included example of a "state prison in Ohio [that] refused to provide Moslems with Hallal food, even though it provided Kosher food," and of a Michigan prison prohibiting Jewish inmates from lighting Chanukah candles "even though 'smoking' and 'votive candles' were permitted") (citations omitted); *Joint Statement* at 16,699 (noting record of "bigotry" against minority religions); *Id.* (giving example of *Sasnett v. Sullivan*, 197 F.3d 290 (7th Cir. 1999), in which prison allowed inmates to wear crosses only if attached to a rosary, as example of "discriminat[ion] against Protestants"); *Post*-Boerne *Hearing* (examining prevalence of discriminatory accommodations).

To be sure, as the State stresses (Resp. Supp. Br. 8), RLUIPA additionally prohibits other forms of conduct imposing burdens on the free exercise rights of institutionalized persons. But that hardly distinguishes RLUIPA from other statutes expressly identified in Section 2000d-7. Section 504 of the Rehabilitation Act, for example, prohibits both

invidious discrimination against individuals with disabilities and failure to provide reasonable accommodations. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 299-300 & n.20 (1985). That RLUIPA requires religious accommodations *in addition* to prohibiting ordinary discrimination on the basis of religion does not change its status as a "statute prohibiting discrimination." 42 U.S.C. § 2000d-7(a).

2. In any event, RLUIPA's accommodation requirement is easily classified as a prohibition against discrimination as well. "Discrimination," this Court has observed, is a "broad term." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). As used in a number of well-known civil rights statutes, the term encompasses not only the unequal treatment of similarly situated individuals,[24] but also, in some circumstances, the unjustified refusal to make reasonable accommodations.

For example, this Court has long recognized that Section 504's accommodation requirement is a form of antidiscrimination protection. *See, e.g., Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979) ("Identification of those instances where a refusal to accommodate the needs of a disabled person *amounts to discrimination* against the handicapped [is] an important responsibility of HEW.") (emphasis added); *see also Choate*, 469 U.S. at 299-300. Congress

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[24] Courts thus have recognized that RLUIPA's proscription against "discrimination" and "unequal treatment" in the land-use context is broader than simply requiring equal treatment of identically situated parties. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004).

shares that judgment. When it enacted the Americans with Disabilities Act, modeled on Section 504, it found that people with disabilities "continually encounter various *forms of discrimination*, including . . . failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101(5) (emphasis added). Thus, in *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999), this Court rejected the contention that the discrimination prohibited by the ADA and Section 504 "necessarily requires uneven treatment of similarly situated individuals." *Id.* at 598. "We are satisfied that Congress had a more comprehensive view of the concept of discrimination." *Id.*; *see also id.* at 598 & n.10.

Congress likewise defined failure to make reasonable accommodations for religious practice without adequate justification a form of unlawful employment discrimination in Title VII. As originally enacted, Title VII simply prohibited discrimination "because of [an individual's] . . . religion." 42 U.S.C. § 2000e-2(a)(2). In 1972, however, Congress amended Title VII "to illuminate the meaning of religious discrimination under the statute," *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986), by requiring employers to "reasonably accommodate to an employee's . . . religious observance" unless doing so would impose an "undue hardship." 42 U.S.C § 2000e(j).

Finally, RLUIPA's accommodation requirement advances the Act's nondiscrimination purpose in much the same way as the disparate impact provisions of other prominent antidiscrimination statutes, including Section 504 and Title VII. *See*

Choate, 469 U.S. at 299-300 (Section 504); 42 U.S.C. § 2000e-2(k) (Title VII). These disparate impact provisions, like RLUIPA, require covered entities to alter policies that while "facially neutral in their treatment of different groups . . . in fact fall more harshly on one group than another" without adequate justification. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

"The principle of *ejusdem generis* suggests that" a catchall phrase at the end of a list "should be understood to refer to items belonging to the same class that is defined by the more specific terms in the list." *Holder v. Hall*, 512 U.S. 874, 917 (1994). In this case, the statutes enumerated in Section 2000d-7 impose the same kinds of requirements as RLUIPA does, to the same kinds of funding recipients, for the same basic purpose. The State thus had no grounds to doubt that RLUIPA was a "Federal statute prohibiting discrimination" following "in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination" by federal funding recipients. *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1914
krussell@howerussell.com

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STATUTORY APPENDIX

STATUTORY APPENDIX

I. RLUIPA

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq., *provides, in relevant part:*

§ 2000cc. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect,

commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief

to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term 'claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term 'Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term 'government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term 'program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious

exercise of the person or entity that uses or intends to use the property for that purpose.

II. Rehabilitation Act Amendments of 1986

The Civil Rights Remedy Equalization provision of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, provides in relevant part:

§ 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State. . . .

RESPONDENT'S BRIEF

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No. 08-1438

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v.

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FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID S. MORALES
Deputy First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Ho@oag.state.tx.us
(512) 936-1700

33306

QUESTION PRESENTED

Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*

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BRIEF FOR THE RESPONDENTS

To establish a waiver of sovereign immunity, petitioner must identify "unmistakably clear" statutory text that put state officials on notice that, by accepting federal funds, they consented to suits for money damages. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 239-240, 242 (1985). So it is not enough for petitioner to offer a reasonable interpretation of the relevant statute. To prevail, he must offer the *only* plausible interpretation—a standard he cannot meet.

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) creates a private cause of action for "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The phrase "appropriate relief" is a textbook example of ambiguity—not unmistakable clarity. It does not clearly waive immunity in damages suits. Relief that is

"appropriate" in one context may not be "appropriate" in another. Moreover, the phrase originates from the Religious Freedom Restoration Act of 1993 (RFRA). RFRA indisputably does not override sovereign immunity in damages suits, as lower courts have unanimously concluded, and as petitioner does not contest. See also U.S. Amicus Br. 24 n.7.

For his part, petitioner invokes the traditional presumption from *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), that if a statute is silent or unclear, courts may impose any remedy they deem appropriate. But this presumption has no place in suits against sovereigns, as the Court made plain in *Lane* v. *Pena*, 518 U.S. 187, 196-197 (1996). In suits against States, courts construe ambiguous statutes in favor of sovereign immunity—not liability.

Petitioner tries to avoid *Lane* by claiming that the traditional presumption from *Bell* somehow has special force as applied to Spending Clause statutes. But that gets it exactly backwards: the presumption has less force, not more, in Spending Clause cases. See *Barnes* v. *Gorman*, 536 U.S. 181, 185-188 (2002) (reversing $1.2 million punitive damage award that would be available outside the Spending Clause context); see also *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 & n.8 (1992) (invoking Spending Clause as potential limitation on *Bell*). Not surprisingly, then, *every* court of appeals to have considered *Lane* has concluded that it precludes RLUIPA suits for damages against States.

Alternatively, petitioner offers an entirely new argument in this Court. Having failed below to identify an unmistakably clear statement respecting damages in RLUIPA, he now contends that no such statement is necessary after all. He does so by in-

voking a 1986 law concerning "provisions * * * prohibiting discrimination." 42 U.S.C. 2000d-7(a)(1). But Section 3 of RLUIPA is not a provision "prohibiting discrimination." On its face, it targets only "substantial burdens"—not "discrimination." It requires favorable treatment, not equal treatment, of religious exercise. Indeed, the Court struck down RFRA (on which RLUIPA is based), as applied to state and local governments, precisely because it is *not* a statute prohibiting discrimination. See *City of Boerne* v. *Flores*, 521 U.S. 507, 517, 535 (1997). Once again, *every* court of appeals to have considered the 1986 law has concluded it does not apply to RLUIPA.

So petitioner has an unenviable task. He must prove that RLUIPA puts state prison officials on "unmistakably clear" notice of damages liability, when the overwhelming consensus has been to the contrary, both during Congressional hearings and in the courts of appeals. The judgment should be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 560 F.3d 316. The opinion of the district court (Pet. App. 36a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2009. The petition for a writ of certiorari was filed on May 18, 2009, and granted on May 24, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in petitioner's brief (at 1-2) and in the appendix to petitioner's brief (at 1a-10a).

STATEMENT

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. 2000cc *et seq.*, is the second attempt by Congress to accord heightened statutory protection to religious exercise in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Congress first enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. 2000bb *et seq.* But the Court invalidated RFRA as applied to state and local governments, holding that it exceeded Congress's power under Section 5 of the Fourteenth Amendment. See *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In response, Congress enacted RLUIPA pursuant to its Commerce and Spending Clause authority. See generally *Cutter* v. *Wilkinson*, 544 U.S. 709, 714-717 (2005).

a. Among other things, RLUIPA addresses two distinct forms of state action affecting religious exercise: "Discrimination" and "Substantial Burdens."

Section 2 of RLUIPA, concerning land use, incorporates both concepts. 42 U.S.C. 2000cc. Section 2(a) targets "Substantial Burdens" by forbidding any land use regulation that "imposes a substantial burden" on religious exercise, unless imposition of the burden is the "least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. 2000cc(a)(1). Section 2(b), entitled "Discrimination

and Exclusion," provides, *inter alia*, that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. 2000cc(b)(2).

By contrast, Section 3 of RLUIPA, concerning institutionalized persons, only restricts state actions that "impose a substantial burden" on religious exercise, unless imposition of the burden is the "least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. 2000cc-1. A plaintiff thus need not allege discrimination to state a claim under Section 3.

This terminology is not unique to RLUIPA, but instead borrows heavily from judicial opinions and prior legislation. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause forbids government from burdening religion without a compelling reason. But in *Smith*, the Court declined to apply *Sherbert* to a neutral law of general applicability, despite the law's imposition of a substantial burden on religion. 494 U.S. at 878. As Justice Blackmun later observed, "*Smith* * * * treated the Free Exercise Clause as no more than an antidiscrimination principle." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring). See also *City of Boerne*, 521 U.S. at 546, 550 (O'Connor, J., dissenting).

Congress was troubled that "[*Smith*] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. 2000bb(a)(4). Accordingly, it enacted RFRA "to restore the compelling interest test as set forth in [*Sherbert*] and

[*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1).

But the Court struck down RFRA as applied to state and local governments. It observed that RFRA shielded religious activities not from discrimination, but from any substantial burden caused by state action. And for that reason, RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment. See *City of Boerne*, 521 U.S. at 517, 535 (explaining that "RFRA's substantial-burden test" is not a discrimination test, or "even a discriminatory-effects or disparate-impact test").

Congress responded by enacting RLUIPA, which adopted the same "substantial burden" standard as in RFRA, pursuant to its powers under the Commerce and Spending Clauses.

b. RLUIPA authorizes a private cause of action for "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). Here, too, the language is not unique to RLUIPA. Congress considered its options in the wake of *City of Boerne* and ultimately used the same phrase as in RFRA. 42 U.S.C. 2000bb-1(c).

On May 5, 1999, Representative Canady introduced H.R. 1691, the Religious Liberty Protection Act (RLPA), invoking Congress's Commerce and Spending Clause powers. Like RFRA before it, RLPA authorized a private cause of action for "appropriate relief against a government." Congressional testimony confirmed that this language in RLPA would not override state sovereign immunity in suits for damages—just as courts had universally

held under RFRA.[1] In addition, Senator Hatch asked whether RLPA should be amended to expressly *preserve* state sovereign immunity. Witnesses unanimously confirmed that such language was unnecessary, because the legislation already lacked the clear statement necessary to override sovereign immunity.[2]

On July 13, 2000, Representative Canady and Senator Hatch jointly introduced H.R. 4862 and S. 2869—what is known today as RLUIPA. Congress enacted S. 2869 into law, without amendment. As with both RFRA and RLPA before it, RLUIPA au-

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[1] See, *e.g.*, *Religious Liberty*, S. Hrg. 106-689, at 91, 145 (June 23 & Sept. 9, 1999) (statement of Douglas Laycock) ("[S]tates and their state-wide instrumentalities are immune from any claim for damages * * *. The Court does not interpret statutes to abrogate state sovereign immunity unless Congress makes an excruciatingly clear statement in statutory text; general language is not enough. * * * RLPA's general language authorizing appropriate relief against a government does not come close to satisfying this standard, as the cases under RFRA repeatedly held."); *id.* at 160 (statement of Chai R. Feldblum) ("I have no doubt that suits for damages against the states are not authorized under RLPA"); *id.* at 170 (statement of Gene C. Schaerr) ("RLPA does not contain a clear legislative statement of intent to subject unconsenting states to damage suits, and will therefore be presumed not to authorize such suits.").

[2] See *id.* at 145 (statement of Laycock) ("Such a disclaimer will be surplusage"); *id.* at 160 (statement of Feldblum) ("There is no need for such a clarification. Unless Congress *expressly states* that the legislation it passes abrogates state sovereign immunity, such abrogation will not occur."); *id.* at 170 (statement of Schaerr) ("I do not believe such a disclaimer is necessary. Courts already presume, in the absence of a 'clear legislative statement' to the contrary, that a statute does not abrogate a state's constitutional sovereign immunity.").

thorizes a private cause of action for "appropriate relief against a government." 42 U.S.C. 2000cc-2(a).

2. Petitioner Harvey Leroy Sossamon, III, has been incarcerated since 2002 in the French M. Robertson Unit of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ). Pet. App. 2a. A self-described "Christian Jew," D. Ct. R. 36, petitioner practices his religion by kneeling at an altar to pray in view of a cross. Pet. App. 2a-3a. He objected to two TDCJ policies that prevented him from observing this tenet of his faith: the "chapel-use" policy and the "cell-restriction" policy. *Ibid.*

a. The chapel-use policy concerned the location of worship services within the prison. Pet. App. 2a-3a. The Robertson Unit comprises separate buildings, some of which are used to house inmates and another of which serves as the main administrative building. *Id.* at 6a-7a. The administrative building contains a chapel. *Ibid.* Until recently, TDCJ prohibited congregational worship in the chapel, due to various security concerns. *Id.* at 5a-6a, 48a-49a. According to an affidavit from the former warden of the Robertson Unit, allowing inmates to congregate in a centralized meeting place can yield hostility among members of rival gangs, who are housed in separate buildings to avoid contact. *Id.* at 48a. The administrative building also contains spaces in which inmates can hide contraband. *Id.* at 7a. Incidents of violence in the administrative building can endanger non-security personnel, as occurred during a riot in the similarly configured chapel at TDCJ's McConnell Unit. *Id.* at 7a, 49a.

TDCJ instead allowed inmates to conduct religious services in multi-purpose rooms located inside the housing buildings. *Id.* at 6a, 48a; D. Ct. R. 37,

39. Petitioner objected that these multi-purpose rooms lacked the furnishings and symbols required by his religious beliefs. D. Ct. R. 24. He also alleged that TDCJ allowed prisoners to engage in secular activities in the chapel. Pet. App. 7a-8a.

As of March 6, 2010, TDCJ has abandoned the chapel-use policy. Inmates are now permitted to attend scheduled worship services in the chapel. D. Ct. R. 563-564. To address security concerns, inmates who choose to worship in the chapel must undergo a strip search of the sort routinely employed at the Robertson Unit. *Ibid.*

b. Under the cell-restriction policy, an inmate confined to his cell for disciplinary infractions was not permitted to leave his cell to attend religious services, but was allowed out to participate in various secular activities. Pet. App. 3a. Pursuant to this policy, petitioner was twice prevented from worshipping outside his cell. *Id.* at 3a-4a.

Upon receiving petitioner's grievance on this point, the warden amended local policy to allow inmates at petitioner's custody level to attend worship services while on cell restriction at the Robertson Unit. Pet. App. 5a. As of October 1, 2008, TDCJ has abandoned the cell-restriction policy for all its prison facilities. Inmates in general population may now attend worship services while on cell restriction. *Ibid.*; C.A. App. tabs 8, 9.

3. Proceeding *pro se* and *in forma pauperis*, petitioner filed a complaint in the United States District Court for the Western District of Texas, D. Ct. R. 16, claiming, *inter alia*, that the chapel-use and cell-restriction policies violate Section 3 of RLUIPA, D. Ct. R. 23-24. He named the State of Texas as a defendant, along with several TDCJ officials in both

their official and individual capacities. D. Ct. R. 28. Petitioner sought declaratory and injunctive relief; compensatory damages of $10,000 per year since 2002; punitive damages of $25,000; and attorney's fees and costs. D. Ct. R. 28-30.

Invoking the Eleventh Amendment, respondents moved to dismiss petitioner's claims for damages against Texas and the TDCJ officials in their official capacities. D. Ct. R. 154-160. Both sides moved for summary judgment. Pet. App. 40a.

The district court granted respondents' motion to dismiss. Pet. App. 56a-57a. The court held that sovereign immunity prevented petitioner from seeking damages under RLUIPA from the State or from TDCJ officials in their official capacities. *Id.* at 42a-43a. As to the remaining claims, the court granted summary judgment for respondents. *Id.* at 56a-57a. It concluded that respondents did not violate petitioner's rights, under RLUIPA or otherwise, *id.* at 54a-56a, and that RLUIPA does not create a damages action against officials sued in their individual capacities, *id.* at 42a-43a.

4. The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. Pet. App. 35a. The court of appeals agreed with the district court that acceptance of federal funds does not waive sovereign immunity against private damages suits under RLUIPA. *Id.* at 20a-24a. The court based this conclusion on the clear statement rule announced in this Court's sovereign immunity jurisprudence. See, *e.g.*, *id.* at 22a & n.46 (citing *Madison* v. *Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) (citing *Lane* v. *Pena*, 518 U.S. 187 (1996))). Finding the term "appropriate relief" to be too ambiguous to sat-

isfy the clear statement rule, the court affirmed the dismissal based on sovereign immunity. *Id.* at 35a.

The court also affirmed the grant of summary judgment as to the individual-capacity damages claims, concluding that RLUIPA authorizes no such claims. Pet. App. 16a. In addition, the court held moot the claims for prospective relief concerning the cell-restriction policy, in light of TDCJ's "good faith * * * cessation" of that policy. *Id.* at 9a-13a. Finally, the court reversed the grant of summary judgment as to the chapel-use policy and remanded for further proceedings regarding declaratory and injunctive relief on that claim. *Id.* at 32a; see also *id.* at 14a (noting that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief"). These proceedings are ongoing in district court, with trial scheduled for December 2010. D. Ct. R. 408.

5. Petitioner sought review in this Court, both as to sovereign immunity and as to individual capacity suits under RLUIPA. Br. in Opp. i (noting two questions presented); U.S. Cert. Amicus Br. I (same). The Court granted certiorari limited to the first question presented: "Whether an individual may sue a State or state official in his official capacity for damages for violations of [RLUIPA]." *Sossamon* v. *Texas*, 130 S. Ct. 3319 (2010).

SUMMARY OF ARGUMENT

In authorizing a private cause of action for "appropriate relief against a government," 42 U.S.C. 2000cc-2(a), RLUIPA does not unequivocally condition a State's acceptance of federal funds upon a waiver of its immunity against a damages suit. The indeterminate phrase "appropriate relief" cannot satisfy the clear statement rule established in this

Court's sovereign immunity jurisprudence, notwithstanding petitioner's various attempts to find clarity amidst ambiguity. Petitioner's reliance on *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), and *Barnes* v. *Gorman*, 536 U.S. 181 (2002), is misplaced, as explained in *Lane* v. *Pena*, 518 U.S. 187 (1996). Nor does the fact that RLUIPA is a Spending Clause statute provide the requisite clarity. After all, the Spending Clause cuts against, not in favor of, the traditional presumption of appropriate remedies where Congress is silent or unclear. Tellingly, every court of appeals to have considered *Lane* has concluded that it precludes suits against States for money damages under RLUIPA.

Having failed below to locate unmistakably clear language of waiver in RLUIPA, Petitioner now maintains, for the first time in this Court, that no such clear statement is required after all. His theory is that a 1986 law, 42 U.S.C. 2000d-7, authorizes his damages claim, even if RLUIPA does not. His claim fails, because Section 2000d-7 applies only to "provisions * * * prohibiting discrimination." The Court's precedents confirm that, even under its broadest conception, "discrimination" is defined as unequal, differential treatment. This conclusion is further reinforced by the fact that Section 2000d-7 explicitly references Title VI of the Civil Rights Act, which prohibits only intentional discrimination. The established definition of discrimination is thus fatal to petitioner's Section 2000d-7 claim. Section 3 of RLUIPA is not a "provision prohibiting discrimination," because it requires favorable—not equal—treatment. Accordingly, every court of appeals to have considered the 1986 law has concluded it does not apply to Section 3 of RLUIPA.

The Court should affirm the judgment below. But there is another option. It is now undisputed that petitioner's claim for damages is destined to fail in all events, because it is barred by the Prison Litigation Reform Act. As a result, the Court may alternatively dismiss the writ as improvidently granted.

ARGUMENT

CONGRESS HAS FAILED TO PROVIDE ANY INDICATION—MUCH LESS THE REQUIRED *UNEQUIVOCAL* INDICATION—THAT STATES ACCEPTING FEDERAL FUNDS WAIVE THEIR IMMUNITY TO PRISONER SUITS UNDER RLUIPA FOR DAMAGES

In light of the constitutional interests at stake, the Court has repeatedly held that only "unmistakable" expressions of legislative intent are sufficient for Congress to extract a waiver of state sovereign immunity as a condition of receiving funds under a Spending Clause statute. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985). Congress may not *presume* that the full panoply of judicial relief will be available in the course of requiring a waiver from suit. On the contrary, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims," *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)—a rule that, as a matter of law and logic, governs state and federal sovereign immunity alike.

Contrary to petitioner's contentions, Congress has failed to provide the requisite clear directive extracting waivers of immunity for damages awards under RLUIPA. First, under its plain terms, RLUIPA itself is insufficiently clear because it says *nothing* explicitly about damages; and second, 42 U.S.C. 2000d-7,

which does explicitly mention remedies but does *not* apply to Section 3 of RLUIPA, does not supply the clarity that RLUIPA itself lacks.

I. RLUIPA'S REFERENCE TO "APPROPRIATE RELIEF"—WITHOUT ANY TEXTUAL HINT OF WHAT RELIEF IS INDEED "APPROPRIATE"—IS INSUFFICIENT TO ESTABLISH A WAIVER OF STATE SOVEREIGN IMMUNITY FOR MONEY DAMAGES

A. Congress's Use Of The Phrase "Appropriate Relief" Does Not Explicitly Authorize Damages Actions Against Sovereign Entities

RLUIPA nowhere authorizes damages actions in suits against sovereigns. Under controlling precedent, statutory text must be unmistakably clear before a court will presume Congress intended to condition the receipt of federal funds on a waiver of immunity. *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *Atascadero*, 473 U.S. at 247. Because that presumption extends not only to immunity from suit, but also to immunity from damages, petitioner's theory must fail unless the text of RLUIPA unambiguously authorized such relief. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (so holding in a case involving federal sovereign immunity). See also *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 506-507 (1998) (recognizing "a correlation between sovereign immunity principles applicable to States and the Federal Government"); *Hoffman* v. *Conn. Dep't of Income Maint.*, 492 U.S. 96, 102 (1989) (plurality op.) (construing provision not to extend in scope to "monetary recovery from the States"). RLUIPA fails this standard.

1. State sovereign immunity is "an essential component of our constitutional structure." *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989). Accordingly, courts will not presume that Congress has swept it aside—or conditioned federal funds on extracting a corresponding waiver from the States—unless it expresses an intent to do so unambiguously in the statutory text. See *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 541 (2002); *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). Absent an "unequivocal indication" that a State has consented to waive its immunity, the State has *not* waived its immunity. *Atascadero*, 473 U.S. at 238 n.1; cf. *Nev. Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 726 (2003) ("For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."); *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

These principles enforce important constitutional limitations on the power of the courts. Because "the principle of sovereign immunity limits the grant of judicial authority in Art. III," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 98 (1984); see also *Seminole Tribe* v. *Florida*, 517 U.S. 44, 64-65 (1996), the judicial power to adjudicate any matter involving a State is limited to the terms of the waiver setting aside the jurisdictional bar, see, *e.g.*, *Pennhurst II*, 465 U.S. at 99 ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued."). Courts accordingly require evidence that is both "unequivocal and textual" to guard against accidental expansion of the judiciary's own power at the expense of a "constitutionally grounded principle." *Coll. Sav.*

Bank, 527 U.S. at 684 (describing "state sovereign immunity"). See also *Dellmuth*, 491 U.S. at 230 ("evidence of congressional intent must be both unequivocal and textual").

This clear statement rule provides an important constitutional check on Congress as well. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will*, 491 U.S. at 65 (internal quotation marks omitted). To the extent the Court "has left primarily to the political process the protection of the States against intrusive exercises" of federal power, courts "must be absolutely certain that Congress intended such an exercise. '[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking [intended] to protect states' interests.'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991). See also *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality op.) (Kennedy, J.) ("These clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.").

The federal government (Br. 24) has implied that the requirement of unmistakable clarity, as applied to state sovereign immunity, does not extend to the *scope* of relief—as it plainly does regarding principles of federal sovereign immunity, see, *e.g.*, *Lane*, 518 U.S. at 192. The federal government is mistaken.

The logic of the Court's decisions applies with equal force to each setting. Neither petitioner nor

the United States have identified any principled reason to treat each entity's immunity any differently in this regard. Indeed, this Court has repeatedly acknowledged the common features and characteristics of state and federal sovereign immunity. See *Coll. Sav. Bank*, 527 U.S. at 682 (finding "no reason why the rule should be different with respect to state sovereign immunity"); *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 506-507 (1998) (recognizing the correlation); *Nordic Vill.*, 503 U.S. at 37 (equating principles from "the Eleventh Amendment context" to principles applicable to federal sovereign immunity); see also Pet. Br. 18 n.7. And for good reason. As a starting proposition, even the federal government would surely agree with the following: in the same way that the United States' sovereign immunity from suit operates as a jurisdictional limit on the judiciary's power, so too does the States' sovereign immunity from suit. But if the *scope* of the waiver on the federal side has the same jurisdictional consequences as its initial waiver from suit, see, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986), it stands to reason that the scope of the States' waiver shares the same jurisdictional effect. The federal government has not offered any basis for concluding otherwise.

"Our sovereign immunity precedents establish that suits against nonconsenting States are not properly susceptible of litigation in courts, and, as a result, that the entire judicial power granted by the Constitution does not embrace authority to entertain such suits in the absence of the State's consent." *Alden* v. *Maine*, 527 U.S. 706, 754 (1999) (internal quotation marks, brackets, and citations omitted). If the State's consent is limited in scope to a certain set

of remedies, then the judicial power is so limited as well. That is the rule that applies to the federal government, and there is no basis for applying a different rule to the States.

2. The clear-statement requirement dooms petitioner's case. He contends that all damages are automatically available unless Congress clearly says otherwise. See Pet. Br. 14-15. Accordingly, rather than asking whether RLUIPA's text expressly and unequivocally authorizes damages, petitioner asks whether the text explicitly *limits* damages as a remedy. This has the controlling standard exactly backwards. When viewing possible waivers of immunity, the judiciary searches for "a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Raygor*, 534 U.S. at 546. And looking at what the law includes, it is plain that Congress has not authorized damages actions against the States: "appropriate relief"—the only guidance Congress provided under RLUIPA's enforcement action—is ambiguous at best.

Indeed, the phrase is entirely question-begging: it simply asks whether damages relief would be *appropriate* in this context. Congress could have authorized damages in any number of ways—and could have done so explicitly using terms like "compensatory damages," "money damages," and perhaps even "remedies at law." But the phrase Congress chose instead offers no "meaningful guidance" to courts or to the States. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 683 & n.2 (1983) (also favorably quoting Judge Wilkey as noting "'the absence of any clue as to the meaning of 'appropriate'" in 42 U.S.C. 7607(f), and further noting that the term lacked any "'comprehensible or principled meaning'"). Because "appro-

priate" means "specially suitable," "fit," or "proper," it is entirely indeterminate in the absence of context. *Id.* at 683. And the only context in this case cuts *against* petitioner's theory: where the defendant is a sovereign entity, monetary relief is distinctly *inappropriate* unless the text unmistakably says otherwise, not the other way around.

3. It is thus unsurprising that six courts of appeals have now squarely held that the phrase "appropriate relief" does not "provide the 'unequivocal textual expression' necessary to effect a sovereign's waiver to suits for damages." *Nelson* v. *Miller*, 570 F.3d 868, 884 (7th Cir. 2009); see also *Holley* v. *Cal. Dep't of Corr.*, 599 F.3d 1108, 1112 (9th Cir. 2010) ("The phrase 'appropriate relief' does not address sovereign immunity specifically at all, let alone 'extend [a waiver of sovereign immunity] unambiguously to * * * monetary claims' in particular."); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 654 (8th Cir. 2009) ("RLUIPA's 'appropriate relief' language does not unambiguously encompass monetary damages so as to effect a waiver of sovereign immunity from suit for monetary claims under Section 3 by acceptance of federal money."); *Cardinal* v. *Metrish*, 564 F.3d 794, 801 (6th Cir. 2009) ("RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages"); Pet. App. 23a ("RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief."); *Madison* v. *Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) ("We conclude that RLUIPA's 'appropriate relief against a government' language falls short of

the unequivocal textual expression necessary to waive State immunity from suits for damages."). The D.C. Circuit has also reached the same conclusion in the context of the Religious Freedom Restoration Act and the federal government's sovereign immunity. See *Webman* v. *Federal Bureau of Prisons*, 441 F.3d 1022, 1023 (D.C. Cir. 2006) (RFRA's provision for "appropriate relief" does "not provide the kind of clear and unequivocal waiver of sovereign immunity governing precedent requires"); see also *id.* at 1026 (Tatel, J., concurring) ("although appellants rightly point out that the term 'appropriate relief' ordinarily 'confers broad discretion on the Court' to fashion a remedy, such sweeping statements have no applicability in the sovereign immunity context") (citation omitted).

This overwhelming judicial consensus alone suggests that "appropriate relief" fails to satisfy the clear-statement standard. *Safford Unified Sch. Dist. No. 1* v. *Redding*, 129 S. Ct. 2633, 2644 (2009) (citing "differences of opinion" in "well-reasoned majority and dissenting opinions" as one factor counseling in favor of qualified immunity); *Wilson* v. *Layne*, 526 U.S. 603, 618-619 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495 (1996) ("[t]he different views expressed by the Courts of Appeals [on the statute at issue] demonstrate that the language of that section is not entirely clear"). Petitioner is simply incorrect that the State should have been expected to reach the opposite (and wrong) conclusion on its own.

B. Petitioner's Efforts To Find Clear Meaning In Textual Ambiguity And Congressional Silence Are All Unavailing

1. Nothing in the plain text casts any doubt on the correctness of the Fifth Circuit's decision—and, indeed, the text emphatically confirms the lack of a damages remedy in actions against the States

a. As an initial matter, petitioner is simply wrong that "appropriate relief" is a term of art. See Pet. Br. 14-22. A true "term of art" is a "word or phrase" with a "specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." *Black's Law Dictionary* 1610 (9th ed. 2009). Yet "appropriate relief" is not "specific" or "precise" in any way. Quite unlike a peculiar or conspicuous phrase—such as "res ipsa loquitur," see *ibid.*—it is hard to imagine a phrase more generic or more commonplace than "appropriate relief." As *Ruckelshaus* confirmed, it lacks any established definition, see 463 U.S. at 683, and instead must take its meaning from its surroundings, see, *e.g.*, *Burlington Sch. Comm.* v. *Ma. Dep't of Educ.*, 471 U.S. 359, 369 (1985) ("The type of relief is not further specified, except that it must be 'appropriate.' Absent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act."); see also *Webman*, 441 F.3d at 1026 (describing the phrase as "open-ended and equivocal"). This, accordingly, is *not* a term that has "a well-settled meaning at common law." *Neder* v. *United States*, 527 U.S. 1, 22 (1999); see also *Evans* v. *United States*, 504 U.S. 255, 259-260 (1992) (looking for terms with "'widely accepted definitions'" and imbued with "'the legal tradition and meaning of centuries of practice'"). On the contrary, it is unthink-

able that Congress consciously debated confirming the availability of damages under RLUIPA, and deliberately chose to add this meaningless phrase as a way to "include an additional layer of clarity" (U.S. Amicus Br. 15)—rather than a common phrase far more direct (such as, for example, "compensatory damages") to accomplish its objective.

Nor, for that matter, is petitioner correct that *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), was using the phrase "appropriate relief" as a term of art. See Pet. Br. 14-17. *Franklin* did invoke that phrase, but it also employed variations of the same language, including "appropriate *remedies*" and (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)) "*available* remedy." 503 U.S. at 66. If "appropriate relief" were intentionally used as a term of art, one would have expected the Court to stick to it; the variations, however, suggest a much more likely explanation: the Court was using generic words to describe a basic concept, not to create shorthand for a specific set of judicial remedies. (And, indeed, even *Franklin* itself never purported to articulate a categorical rule: by announcing only a "general" standard, the Court itself accounted for the possibility of exceptions and variations in appropriate circumstances. See 503 U.S. at 70-71.) The decision in *Barnes* v. *Gorman*, 536 U.S. 181 (2002), readily confirms this: "*Franklin* * * * did not describe the scope of 'appropriate relief.'" 536 U.S. at 185.

Petitioner's reliance on *Franklin* is flawed for yet another reason. According to petitioner, Congress must have modeled the "appropriate relief" language from snippets of that opinion. Pet. Br. 20 ("the phrase 'appropriate relief' is obviously transplanted from *Franklin*"). The problem with this theory is

that the phrase "appropriate relief" in RLUIPA was obviously transplanted *from RFRA*. Those two statutes shared a common origin, and they both employ the identical language. Since RFRA was *not* premised on Congress's Spending power—and had nothing to do with the specific context of *Franklin*—petitioner is wrong to presume that Congress necessarily had *Franklin* in mind while drafting RLUIPA.

Petitioner's final two attempts to bolster his "term of art" argument also fall flat. He relies first on *West* v. *Gibson*, 527 U.S. 212 (1999), as an example of this Court construing another statute with comparable language and authorizing a damages remedy. Not only does *West* fail to support petitioner's argument, however, but it in fact proves respondents' point. *West* held that damages were available under Title VII because Congress *explicitly* made damages available in the text of the statute. See 527 U.S. at 217-218. That is precisely the kind of textual clear statement required before presuming any damages remedy against a sovereign (and that was *not* the work of "appropriate remedies" as a term of art). In addition, *West* held that the *identical* "appropriate" remedies language meant *two different things at two different times*—one before the 1991 Compensatory Damages Amendment and something else after it. Instead of confirming the phrase as a term of art with a set and specific meaning, *West* read "[t]he meaning of the word 'appropriate'" to "permit[] its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now." *Id.* at 218.

Nor does *Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO*

v. *Hardeman*, 401 U.S. 233 (1971), support petitioner's theory. Hardeman involved a non-sovereign plaintiff suing a non-sovereign defendant, and accordingly its holding is hardly relevant here. Nor, in any event, did any party clearly dispute the availability of damages in that case. Finally, the statutory language at issue there, unlike RLUIPA's language here, at least was slightly more suggestive: the statutory phrase, which provided for appropriate relief "*including* injunctions," suggested that relief was not *limited* to injunctions. 401 U.S. at 240-241. *Hardeman* alone cannot satisfy petitioner's burden.

b. The federal government does not directly label "appropriate relief" as a term of art, but it does suggest that the "well-worn" phrase has a clear meaning. The federal government, however, cannot truly mean what it says—otherwise RFRA, which employs the same language in its statutory cause of action, would *unambiguously* overcome the sovereign-immunity defense that the federal government contends applies to actions under that statute. See U.S. Amicus Br. 24 n.7. Either the phrase has an established legal meaning or not. It cannot shift definitions depending on whether the federal government is on one side of the "v."

c. Nor is petitioner correct that other provisions of RLUIPA supply the clarity missing from the operative "appropriate relief" clause. First, the fact that the United States is restricted to seeking declaratory and injunctive relief (42 U.S.C. 2000cc-2(f))—a limitation not expressly included in the provision authorizing private-party suits—is wholly beside the point. Contra Pet. Br. 21; U.S. Amicus Br. 16. When the United States sues a State, *there is no immunity defense*. See, *e.g.*, *Employees of the Dep't*

of Pub. Health & Welfare v. *Dep't of Pub. Health & Welfare*, 411 U.S. 279, 286 (1973). Because the default in such suits is the same as the default in suits against non-sovereign defendants, it is entirely sensible that Congress would be forced to *affirmatively* exclude relief it had *implicitly* excluded under the private-party provision.

Nor is there anything unusual about Congress employing "appropriate relief" for the private-party action and "declaratory and injunctive relief" in the U.S. suit provision. For one, if damages are available against non-sovereign entities, Congress would have sensibly included a malleable phrase (like "appropriate relief") to preserve the default rule in private-party actions. For another, Congress sensibly used the broader phrase under subsection (a) (read: "appropriate relief") because subsection (a) itself has a broader scope: while only *affirmative* suits may be brought by the United States under subsection (f), subsection (a) also contemplates parties invoking RLUIPA's protections "as a defense." Congress's use of this broader language ensures that courts can react to a valid RLUIPA defense in "appropriate" ways (such as dismissing a claim) that does not necessarily involve the technical equivalent of awarding "declaratory or injunctive relief."

Second, the provision authorizing a "broad construction" of RLUIPA's text (see 42 U.S.C. 2000cc-3(g)) is best understood as addressing the *substantive* standards in the statute, and not the scope of available relief. In any event, under the clear-statement rules, the "maximum extent" of relief permitted under the Court's precedents is whatever Congress provided with unmistakable clarity in the text itself. Otherwise, it is not readily apparent that

the political branches contemplated (as they must) the serious incursion into the federal-state balance by opening state treasuries to damages actions by state prisoners. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 321 (1986) ("policy, no matter how compelling, is insufficient, standing alone, to waive * * * immunity").

Finally, Congress's explicit incorporation of the Prison Litigation Reform Act of 1995, see 42 U.S.C. 2000cc-2(e), does not prove that damages are available lest the PLRA reference become "largely pointless." Pet. Br. 23. Petitioner simply ignores that the PLRA includes a host of other provisions, including, for example, exhaustion requirements that this Court itself cited in *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 n.12 (2005).

d. Nor can petitioner account for other statutory provisions that cut against a damages remedy. Section 2000cc-2(a), for example, provides that a person may assert a violation of the act "as a claim *or defense*" and obtain "appropriate relief." 42 U.S.C. 2000cc-2(a) (emphasis added). Since a party never obtains damages from a winning *defense*, this casts further doubt on petitioner's understanding of the statute as employing a "term of art" authorizing monetary relief. In addition, the statutory text says "appropriate *relief*," not "appropriate *remedies*"—and there is a difference. "Relief" is a term used for redress that is "esp[ecially] equitable in nature." *Black's Law Dictionary* 1295 (7th ed. 1999). If Congress were thinking carefully about authorizing a damages remedy across the board, it presumptively would have opted for that very word—"remedy"—rather than "relief."

e. Finally, petitioner is simply incorrect that the State's understanding of "appropriate relief" would violate the principle announced in *Clark* v. *Martinez*, 543 U.S. 371 (2005), that courts may not "give the same statutory text different meanings in different cases." 543 U.S. at 386. That fact that relief "appropriate" in one setting maybe not be "appropriate" in another does not change *the meaning of the statutory term "appropriate" itself.*

2. Petitioner and the federal government are incorrect that the Spending Clause backdrop (or the contractual nature of the States' obligations) supply the clarity that was lacking textually in the statute itself

a. Because Congress did not unmistakably authorize a damages remedy in RLUIPA's actual text, RLUIPA necessarily does *not* authorize damages in suits against sovereigns. Contrary to petitioner's contention, *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes* v. *Gorman*, 536 U.S. 181 (2002), do not hold otherwise. Pet. Br. 26-28. Both cases involved *non-sovereign* defendants, and so the limits on relief from sovereign entities were simply not present. See, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 196-197 (1996); see also *Barnes*, 536 U.S. at 187 ("We have also applied the contract law analogy in finding a damages remedy available in *private* suits under Spending Clause legislation.") (emphasis added). Where a defendant is a county or municipality—and is not protected from immunity—monetary relief may very well be "appropriate." *E.g.*, *Bd. of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 369 (2001); *N. Ins. Co. of N.Y.* v. *Chatham County*, 547 U.S. 189, 193-194 (2006). But as the Court held in *Lane*, the opposite rule applies in suits,

such as the one here, against a sovereign entity. 518 U.S. at 196-97.

Petitioner and the federal government purport to distinguish *Lane* on the ground that it involved the federal government itself—and accordingly did *not* involve a contract-law analogy or a Spending Clause enactment. But that explanation has no foundation anywhere in *Lane*'s rationale. *Lane*, after all, did not turn on the presence of a *federal* defendant, but rather on a *sovereign* defendant. See 518 U.S. at 195-197. The fact that the case involved the federal government was relevant only to the extent that the federal government happens to be a *sovereign* entity: "Petitioner's reliance on [*Franklin*] * * * is misplaced," because "when it comes to an award of money damages, *sovereign immunity* places the Federal Government on an entirely different footing than private parties." *Id.* at 196 (emphasis added). "[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which *sovereign immunity has been expressly waived*." *Id.* at 197 (emphasis added). These principles apply equally to States, as petitioner himself acknowledges (see Br. 18 n.7). In order to "sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims. *Lane*, 518 U.S. at 192. (The need for the clear-statement rule, after all, is no less when Congress is acting under its Spending Power. There is still the same interest in ensuring "the efficacy of the procedural political safeguards" designed to protect the States against "intrusive exercises" of federal power. *Gregory*, 501 U.S. at 464.)

b. Not only was the Spending Clause context irrelevant to *Lane*'s rationale, but petitioner's reliance on it reflects a fundamental misunderstanding of Spending Clause cases. Both petitioner and the federal government presume that States are presumptively subject to damages under Spending Clause enactments (and other contract-law arrangements) unless the cause of action in question explicitly *limits* the available relief—in other words, unless "the traditional presumption" in favor of a court's power to award all available relief is explicitly overturned. *Franklin*, 503 U.S. at 70. This argument misreads the core doctrinal foundation of *Franklin* and *Barnes*.

Under a plain reading of *Franklin* and *Barnes*, it is apparent that the default presumption—all damages are available unless Congress expressly says otherwise—comes directly, and explicitly, from the line of cases associated with *Bell* v. *Hood*: once Congress creates a cause of action, the federal judiciary presumptively has the background authority to award any relief available in the traditional panoply of judicial remedies. See *Barnes*, 536 U.S. at 185; *Franklin*, 503 U.S. at 68. Yet that logic *has nothing to do* with the fact that the enactments at issue arose under the Spending Clause—or that such Spending Clause enactments share a contract-law analogy. On the contrary, the "traditional presumption" has everything to do with the *Bell* presumption that would operate in exactly the same way even if the statute were enacted under any other enumerated power in Article I or elsewhere in the Constitution. In other words, the authority to invoke all "appropriate remedies" was not the product of the Spending Clause or contracts—it was the product of having *any* federal

cause of action against a private party in federal court.

Indeed, where these decisions did discuss the Spending power, they did so as a potential way to *limit* the available relief, not to expand it. In *Franklin*, for example the Court simply rejected the Spending Clause context as a reason *not* to rely on the *Bell* v. *Hood* presumption: it said that the Spending backdrop was not a basis for cutting back (read: *limiting*) the relief traditionally available when federal courts have jurisdiction over any federal action. See 503 U.S. at 74-75.

Barnes proceeded along identical lines. The Court again invoked *Franklin*'s background presumption from *Bell* v. *Hood*, see *Barnes*, 536 U.S. at 185, and looked to the Spending Clause context again only to *limit* damages otherwise available: and, in fact, it held that punitive damages were barred under the statute (even though such damages were presumptively available elsewhere outside the Spending context) because parties to a contract would not expect it. See *id.* at 187-189. The Spending backdrop, accordingly, did not *authorize* or *increase* the scope of relief parties presumptively should have anticipated. On the contrary, private parties, under the traditional default presumption, were automatically on notice of the full panoply of judicial remedies ordinarily available in federal actions to enforce federal rights. The Spending Clause context, in both *Franklin* and *Barnes*, was merely a possible means of narrowing, not expanding, the scope of otherwise available relief.

This therefore proves petitioner's error and the federal government's error in relying so heavily on the Spending Clause as a means for *increasing* liabil-

ity. The contract-like character of these enactments are not now, and have never been, a basis for treating spending recipients differently (and *worse*) than defendants in suits brought under non-spending federal statutes. And for good reason: it would be an odd rule that treats parties *less* favorable in a clear-notice context.

In sum, this reveals that petitioner's theory must stand or fall on the strength of applying the *Bell* v. *Hood* presumption in cases against a sovereign entity. Yet that would be a truly breathtaking consequence. The inherent powers of the judiciary to fashion or formulate relief have never extended to declaring relief available against sovereign entities. For those entities, immunity stands as a categorical answer to any requests for relief unless the legislative body has unmistakably abrogated that immunity or secured a proper waiver extending explicitly in scope to the particular kind of relief in question.

c. This, of course, does not suggest that the clear-statement requirement is more demanding in cases involving sovereign defendants. On the contrary, it simply recognizes that Congress must be clear as to each element of its Spending enactments: because private parties are not protected by sovereign immunity, Congress's decision to authorize a suit is sufficient to put all private parties on notice of their potential liability. When it comes to sovereign defendants, however, Congress cannot simply authorize the same cause of action (or raise the possibility of the same relief) and stop; the provision authorizing a judicial action must also address possible *defenses* to that action, including jurisdictional defenses related to sovereign immunity. See, *e.g.*, *Nordic Vill.*, 503 U.S. at 38 ("The fact that Congress grants *jurisdic-*

tion to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct.'") (quoting *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 787 n.4 (1991)).

Unless there is clear statutory text demonstrating that Congress confronted this question and induced States to waive their immunity from both suit and retrospective money damages, the States continue to have a valid defense (and the courts continue to lack jurisdiction) regarding any claim brought pursuant to the general statute.

Nor, accordingly, is the State asserting a "magic words" requirement. There is no set formulation that Congress must invoke. But Congress must say at least *something* with respect to the scope of damages, and the corresponding scope of any waiver of immunity, when authorizing actions against State defendants.

d. In an effort to show that immunity against damages suits somehow melts away when a contract is breached, petitioner (Br. 33-34) and the federal government (Br. 22-24) invoke the Tucker Act, codified at 28 U.S.C. 1491(a)(1). That statute only confirms the need for a textual waiver of sovereign immunity that is clear as to the scope of relief. By enacting the Tucker Act and its antecedents, Congress expressly consented to a damages remedy for breaches of federal contracts. There being no such statute here, the proposed analogy does not further petitioner's cause.

Petitioner correctly notes (Br. 33) that "[t]he United States has consented to suit for breach of federal contracts through the Tucker Act." See 28 U.S.C. 1491(a)(1). But he errs in stating (Br. 34) that the remedial scope of this waiver is defined by

"the longstanding legal tradition of money damages * * * for breach of contract." It is the Tucker Act itself, not the law of contracts, that waives federal sovereign immunity against damages suits.

The Tucker Act effects this waiver by providing jurisdiction to the United States Court of Federal Claims. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551-1552 (2009); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Such jurisdiction has long been limited to ordering money judgments against the federal government, as required by the text of the Tucker Act and its predecessor statutes. See, *e.g.*, *United States* v. *Jones*, 131 U.S. 1, 14-18 (1889) (construing the Act of Mar. 3, 1887, 24 Stat. 505, known as the Tucker Act); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-576 (1868) (construing the Act of Feb. 24, 1855, 10 Stat. 612).

Congress thus allows private litigants to sue the United States for various claims, including breaches of contract, in a court whose sole function it is to award money damages and whose very existence operates to waive federal sovereign immunity. In this way, the Tucker Act itself provides the requisite clear statement waiving sovereign immunity.[3] And having *explicitly* provided a waiver for damages ac-

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[3] In quoting the Tucker Act, the federal government declines to mention (Br. 23) that the jurisdiction of the Court of Federal Claims extends to "any claim against the United States * * * for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491(a)(1). Construing the Tucker Act just two years after its passage, the Court construed the phrase "'[d]amages in cases not sounding in tort'" to mean "damages for breach of contract." *Jones*, 131 U.S. at 16.

tions, it was not necessary to identify a *second* waiver hidden somewhere in contract principles.

e. The federal government, finally, has it exactly backwards in suggesting that the identical phrase ("appropriate relief") in RFRA is insufficient to authorize damages against the U.S. while the same language in RLUIPA is sufficient to authorize damages against the States. The standard applicable when the federal government regulates its own conduct is not less stringent than the standard applicable when the federal government purports to regulate State entities. Only the latter threatens the delicate balance of our system of dual sovereignty. It would stand the law on its head to suggest that less is required when an additional constitutional dimension is at stake.

3. The statutory purpose is consistent with limiting remedies against sovereign entities to equitable relief.

a. As an initial matter, petitioner is incorrect to cite his view of the statutory purpose in an effort to overcome the fact that the text itself does not waive immunity for damages. When sovereign immunity is at stake, the only *relevant* indicator of legislative intent is the language Congress employed in the statute itself. Broad presumptions about congressional purpose—unsupported, of course, by any explicit statutory text—are meaningless in this context: such assumptions fail to reveal that the political branches confronted the difficult question to waive immunity to damages suits, and any unstated congressional objective fails to put States on unmistakable notice of a waiver of a constitutional prerogative. See, *e.g.*, *Shaw*, 478 U.S. at 321.

b. In any event, petitioner's view of the statutory objective is incorrect. The PLRA bar on non-physical injuries (see Part III, *infra*), for example, emphatically confirms that Congress did not consider damages as an essential enforcement mechanism under the statute.

c. Nor does the lack of compensatory damages otherwise undercut the statute's effectiveness. Amici contend, for example, that "non-monetary remedies are woefully inadequate on their own to safeguard prisoners' rights." ACLU Amicus Br. 7. But this system of "non-monetary remedies" strikes the same balance this Court has struck between protecting principles of sovereign immunity and securing the supremacy of federal law. The *Ex parte Young* doctrine authorizes prospective, equitable relief, but forbids any kind of retrospective award, including those involving damages. If that settled practice has proved highly effective in guaranteeing the supremacy of federal law (read: effective compliance with federal rights), there is little reason to believe that a comparable rule limiting RLUIPA relief against States would prove inadequate. And, in fact, the opposite is true: the wealth of examples collected by petitioner and his amici reveal States typically altering their conduct wherever possible to accommodate an inmate's religious practice in accordance with RLUIPA's mandate. That is strong evidence of the statute working exactly as it was intended. There is little reason to conclude Congress would have nonetheless encouraged additional prisoner litigation to resolve problems that have already been fixed.

II. HAVING FAILED TO IDENTIFY THE REQUISITE WAIVER OF IMMUNITY IN RLUIPA, PETITIONER CANNOT NOW SHOEHORN HIS SUBSTANTIAL-BURDEN CLAIM INTO 42 U.S.C. 2000D-7'S CATCH-ALL WAIVER FOR SPENDING CLAUSE PROVISIONS "PROHIBITING DISCRIMINATION"

Petitioner maintains, for the very first time, that no clear statement in RLUIPA is required after all. He now claims that a 1986 law, 42 U.S.C. 2000d-7, authorizes his damages claim, even if RLUIPA does not. See Pet. Br. 38-43; see also U.S. Amicus Brief 25-33. Section 2000d-7 explicitly waives sovereign immunity in damages suits based on violations of "section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*." 42 U.S.C. 2000d-7(a)(1), (2) (emphasis added). Petitioner contends that this final, catch-all clause sweeps in RLUIPA as a statute "forbidd[ing]" discrimination by recipients of federal funds. Pet. Br. 39. He is mistaken.

Section 3 of RLUIPA, addressing "substantial burdens" on institutionalized persons, is not an "antidiscrimination" provision under any ordinary understanding of that term. Section 3 does not require a showing of unequal treatment. Quite the contrary: Section 3 requires States to provide *favored* treatment to religious exercise, excusing inmates even from neutral rules of general applicability. Because that kind of accommodation is far afield from "discrimination," petitioner's theory fails under any fair reading of Section 2000d-7. And that means his theory is doomed at the outset: immunity is

waived only if the statutory text unambiguously compels that conclusion, so his inability to offer even a plausible reading of Section 2000d-7 stops this argument before it starts. There is no backdoor waiver of immunity under Section 2000d-7's catch-all clause prohibiting "discrimination."

A. As A Matter Of Plain Text, Common Parlance, And Legal Precedent, RLUIPA's Provision Targeting Substantial Burdens Is Not A Provision "Prohibiting Discrimination"

Petitioner's first error is his failure to recognize the critical difference between a statute proscribing the imposition of a "substantial burden" and a statute prohibiting "discrimination." That error renders petitioner's theory incompatible with a plain reading of the statutory text and this Court's precedent.

1. Both petitioner (Br. 41) and the United States (Br. 30) contend that "discrimination" is a "'broad term'" that sweeps in all manner of conduct that is not, in fact, overtly discriminatory. They are incorrect. Discrimination is indeed a "broad" term, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005), but it is not limitless. It has core features that are identifiable under its ordinary definition and under this Court's precedent—neither of which supports the unduly expansive understanding of that term raised in support of petitioner here.

As an initial matter, the United States has recently submitted a brief to this Court stating its objective view of the "ordinary" understanding of "discrimination"—and it is exactly what one would expect in everyday conversation: "The ordinary meaning of the word 'discrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not

favored.'" U.S. Amicus Br. 13, *CSX Transp., Inc.* v. *Ala. Dep't of Revenue* (No. 09-520) (quoting *Black's Law Dictionary* 534 (9th ed. 2009)). And even in this case, the United States, while advocating for a "broad" construction of "discrimination" under Section 2000d-7, acknowledges that the term is limited to "'intentional unequal treatment.'" U.S. Amicus Br. 30 (quoting *Jackson*, 544 U.S. at 175).

The "ordinary meaning" of discrimination offered by the United States in *CSX* is correct—and devastating to its position here. The Court has defined "discrimination" interchangeably as "intentional unequal treatment" or "differential treatment." See, *e.g.*, *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1936-1937 (2008) (retaliation is a "form of discrimination because the complainant is being subjected to differential treatment") (internal quotation marks omitted); *Jackson*, 544 U.S. at 175 ("'Discrimination' is a term that covers a wide range of intentional unequal treatment"); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 614 (Kennedy, J., concurring in the judgment) (describing "the normal definition of discrimination" as "differential treatment of similarly situated groups").

"Discrimination" does not, in any ordinary sense, target neutral rules of general applicability. And it certainly does not target such laws in a way that requires States to create discriminatory *exemptions* in favor of conduct that the State otherwise has valid reasons to forbid.

The federal government, much like petitioner, is therefore wrong to contend that the State's argument turns on such semantics as RLUIPA's failure to "use the *word* 'discrimination,'" U.S. Amicus Br. 28 (emphasis added)—although the federal government underestimates the importance of focusing on the words

Congress chooses, see Part II.A.2-II.A.3, *infra*. It is Congress's failure to invoke the *concept* of discrimination under its "ordinary" definition that distinguishes Section 3 of RLUIPA from a provision truly "prohibiting discrimination."[4]

2. Not only has petitioner failed to prove that Congress abandoned the usual understanding of the term "discrimination," but he cannot even explain how his understanding of that term is consistent with the surrounding provisions in RLUIPA itself.

Section 3 of RLUIPA, the provision at issue, targets government action that imposes certain "substantial burden[s]" on religious exercise, even when resulting from "a rule of general applicability." 42 U.S.C. 2000cc-1(a). In Section 2 of RLUIPA, by contrast, Congress specifically targets "[d]iscrimination," including regulations "that discriminate[]" against religious organizations. 42 U.S.C. 2000cc(b)(2). Congress thus imposed two different standards on state action in two different contexts: one targets overt discriminatory activity (Section 2) and the other targets laws that impose substantial burdens on religious exercise, even if only

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[4] Petitioner cannot override the ordinary definition of "discrimination" by relying on cases such as *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). See Pet. Br. 41. The fact that, at times, a refusal to accommodate certain individuals or practices will become "arbitrar[y]," and hence potentially discriminatory, *Davis*, 442 U.S. at 412, does not suggest that a statute subjecting State rules to a *strict-scrutiny standard*—and hence invalidating legitimate policies enacted in good faith—is "discriminatory" in character notwithstanding its lack of any focus on the State's intent and its inclusion of "general[ly] applicab[le]" rules, 42 U.S.C. 2000cc-1(a).

incidentally in the course of enforcing otherwise legitimate rules (Section 3). Congress's invocation of two different standards in adjacent provisions of the same statute confirms that Congress both knew and understood the difference between "discrimination" and "substantial burden." See, *e.g.*, *Gomez-Perez*, 128 S. Ct. at 1940; *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 536 (1994). And, of course, Congress's conspicuous omission of any "antidiscrimination" provision in Section 3 indicates that Congress intentionally refused to slap a "discrimination" label on the conduct it was targeting in that provision, see, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983)—the very label that, notwithstanding this clear textual directive, petitioner attempts to employ.

Neither petitioner nor the federal government can answer this argument. In fact, the federal government has abandoned its previous effort to reconcile the two provisions at the petition stage. See U.S. Amicus Brief 13 n.8, *Cardinal* v. *Metrish* (No. 09-109) (suggesting at the time that the "close proximity" of these contrasting provisions shows "Congress saw the two as of a piece"). And for good reason: Congress did not use different language in adjacent sections of the same act because it intended for them to mean the same thing. The failure to account for this inconsistency, however, is hardly a mark of confidence in their effort to establish "unmistakable" congressional intent that States have waived their immunity under Section 2000d-7 for claims under Section 3 of RLUIPA. See Part II.C, *infra*.[5]

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[5] To the extent Amicus Curiae National Association of Evangelicals suggests (Br. 8-12) that Section 3 of RLUIPA is caught in Section 2000d-7's catch-all because *Section 2* of RLIUPA

3. Just as petitioner cannot account for the neighboring provisions in RLUIPA (Sections 2 and 3), he also cannot account for the statutes expressly enumerated in Section 2000d-7.

It is an established canon of construction that "'[a] word is known by the company it keeps'—a rule that 'is often wisely applied where a word is capable of many meanings in order to avoid the giving of *unintended breadth* to the Acts of Congress.'" *Dolan* v. *USPS*, 546 U.S. 481, 486-487 (2006) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)) (emphasis added). That rule squarely applies here.

Each of the enumerated provisions in Section 2000d-7 prohibits, textually and explicitly, intentional disparate treatment. See 20 U.S.C. 1681 (prohibiting "discrimination"); 29 U.S.C. 794 (prohibiting "discrimination"); 42 U.S.C. 2000d (prohibiting "discrimination"); 42 U.S.C. 6101 (prohibiting "discrimination"). Each, however, does *not* sweep past that core prohibition to attack neutral laws of general applicability. Indeed, this Court has repeatedly held that "Title VI itself prohibits only intentional discrimination." *Jackson*, 544 U.S. at 178; see also

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renders the entire statute one "prohibiting discrimination," Amicus is plainly incorrect. That argument overlooks a critical phrase in the operative clause from Section 2000d-7: the statute does *not* say "any other statute prohibiting discrimination," but instead "the *provisions* of any other Federal statute prohibiting discrimination." 42 U.S.C. 2000d-7(a)(1) (emphasis added). The appropriate analysis, accordingly, is whether the *provision* (here, Section 3) prohibits discrimination, not whether the "statute" (or any other part of it) prohibits discrimination.

Alexander v. *Sandoval*, 532 U.S. 275, 280-281 (2001); *Alexander* v. *Choate*, 469 U.S. 287, 293 (1985).

That alone is sufficient to show that Section 2000d-7's catch-all clause is necessarily limited to the core conduct (read: *intentional discrimination*) common to each of the enumerated provisions. If Title VI fails textually to reach "disparate impact" prohibitions, see *Sandoval*, 532 U.S. at 281, then surely there is no reason to construe "discrimination" in the catch-all clause even more expansively, to reach neutral rules imposing substantial burdens on certain rights. It is the *related* meaning that controls. See *Dolan*, 546 U.S. at 487. The common denominator of all four listed statutes is, and only is, a prohibition of the kind of intentional discrimination that is *not* the focus of RLUIPA's Section 3.

Both petitioner and the federal government attempt to expand the catch-all clause's reach by focusing on Section 504 of the Rehabilitation Act and 42 U.S.C. 2000e-2(a) in Title VII. See Pet. Br. 41-43 (contending both extend to accommodations); U.S. Amicus Br. 30-32 (same). But the flaws of this approach are plain. Focusing on only two provisions (only one of which, Section 504, is *even listed* in Section 2000d-7) hardly explains the common core of *each* enumerated provision. The point of the *ejusdem generis* canon is not to expand a catch-all clause to the furthest reaches of each item in a list, but rather to limit the general term to the common elements shared by all. See *Holder* v. *Hall*, 512 U.S. 874, 917 (1994).

4. Petitioner's final mistake on this score is his refusal to acknowledge the strong judicial precedent—in this context and elsewhere—drawing a sharp distinction between "discrimination" provi-

sions and those imposing "substantial burdens" or requiring accommodations.

And, indeed, there is a clear distinction, as a matter of law and logic, between provisions requiring accommodations (like Section 3 of RLUIPA) and those prohibiting discrimination (like the sections specified in Section 2000d-7). The entire point of RLUIPA, after all, was to reenact, in the wake of *City of Boerne*, RFRA's attempt to restore protection against "'neutral'" laws that nonetheless "burden religious exercise." 42 U.S.C. 2000bb(a)(2). But there is a central and fundamental difference between placing an incidental *burden* on religion and intentionally *discriminating* against religion, a point this Court has repeatedly reinforced. See, *e.g.*, *City of Boerne*, 521 U.S. at 535 ("RFRA's substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. * * * When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531, 535 (1993) ("a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice"; "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination"); *Smith*, 494 U.S. at 890; see also *City of Boerne*, 521 U.S. at 546 (O'Connor, J., dissenting) (explaining how the "substantial burden" standard extends past "an antidiscrimination principle").

Nor has the Court restricted this doctrinal distinction to the free-exercise context. On the contrary, it has been applied in a variety of settings. See, *e.g.*, *Smith*, 494 U.S. at 878-879, 886 & n.3, 890 (citing examples); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact").

Section 3 of RLUIPA falls squarely within the category of accommodations, given its focus on neutral rules and the removal of substantial burdens. There is no reason the Court should abandon the doctrinal distinction now and hold that discrimination, for purposes of Section 2000d-7 alone, extends far beyond acts of intentional disparate treatment—and renders "discriminatory" precisely what *Smith* held did not violate the Constitution in the first place.

B. Contrary To Petitioner's Contention, The Fact That RLUIPA May Incidentally "Prevent" Discrimination Does Not Overcome The Fact That RLUIPA Does Not, By Design, "Prohibit" Discrimination

Because petitioner and the federal government cannot prove that the relevant provision of RLUIPA actually "prohibit[s] discrimination," they instead attempt to show that, in certain instances, the statute may sweep in instances of discrimination—not according to the design of the statute on its face, but by chance occurrence. See Pet. Br. 39-40; U.S. Amicus Br. 29. In other words, according to petitioner and the federal government, if a provision that does *not* prohibit discrimination (under any ordinary understanding of that word) by happenstance sweeps in

some discriminatory conduct, the entire provision is transformed into a prohibition of discrimination.

That is an odd way to read the statute. A statute prohibits discrimination if *its terms* prohibit discrimination: the language must forbid acts treating similarly situated individuals in an unequal manner on the basis of a protected characteristic. See Part II.A.1, *supra*. Although that describes a portion of Section 2 (42 U.S.C. 2000cc(b)), it does not describe any portion of Section 3 (42 U.S.C. 2000cc-1(a)).

No one would describe an anti-arson law that forbids *all* arsons as a provision "prohibiting discrimination"—and that is so even though the law would incidentally punish arsonists who specifically target churches because of the congregants' race or religion. The enforcement of the law may *prevent* the latter kind of discrimination, but the anti-arson law itself still does not *prohibit* discrimination. Cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 269-270 (1993).

The federal government suggests that the cell-restriction claim in this very case proves their point (Br. 30), but it proves the opposite. Imagine, for example, if the cell-restriction policy restricted inmates from attending any activities, whether religious or secular. The merits of petitioner's claim would remain the same. The substantial burden alleged by petitioner is his inability to attend religious services, not the prison's decision to permit the attendance of any other activities. After all, the availability of those other activities would have no impact on any alleged burden on petitioner's desire to "attend worship services." Once again, Section 3 precludes the imposition of certain "substantial burdens," but it is still not a provision "prohibiting discrimination."

C. Petitioner's Reading Is Barely Plausible, Much Less Unmistakably Clear As Required To Overcome Sovereign Immunity

Because petitioner's understanding of Section 2000d-7 and RLUIPA is not unambiguously compelled by either statutory text, his theory fails for yet another fundamental reason: Section 2000d-7's language, as applied to RLUIPA, is not so unmistakably clear that it commands the conclusion that immunity has been waived. This lack of unequivocal clarity itself independently undermines petitioner's claim. See *Lane*, 518 U.S. at 199-200 (applying clear statement rule to Section 2000d-7).

Petitioner has failed to eliminate other "reasonable constructions" of the statute in multiple respects. See *Atascadero*, 473 U.S. 239-240 (internal quotation marks omitted). As discussed above (see Part II.A), there is no reason to depart from the "ordinary" meaning of discrimination, or from the Court's settled precedent recognizing stark lines between substantial burdens and discriminatory practices. The enumerated statutes surrounding the catch-all clause do not uniformly apply to acts beyond intentional discrimination, so it is certainly reasonable, if not required, to construe the catch-all as limited to the common denominator of those statutes (read: intentional discrimination, not substantial burdens). For these and other reasons, Congress did not "manifest[] a clear intent" that Section 2000d-7 would trigger waivers of immunity under Section 3 of RLUIPA. *Atascadero*, 473 U.S. at 247.

Unsurprisingly, then, all three federal courts of appeals to have considered the question have concluded that Section 2000d-7 does not include Section 3 of RLUIPA. See *Holley* v. *Cal. Dep't of Corr.*, 599

F.3d 1108, 1113 (9th Cir. 2010) (contrasting Section 2 from Section 3 of RLUIPA and finding the lack of an unequivocal textual waiver); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 654-655 (8th Cir. 2009) (same); *Madison* v. *Virginia*, 474 F.3d 118, 132-133 (4th Cir. 2006) (explaining that, unlike RLUIPA, the statutes enumerated in Section 2000d-7 explicitly prohibit "discrimination" and mandate equal treatment, not "religious accommodation").[6]

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[6] Petitioner's Section 2000d-7 argument is not only spiritless; it was neither presented nor passed upon in either court below. Petitioner below claimed only that RLUIPA itself contained a clear statement waiving immunity in damages suits. In this Court, petitioner contends that sovereign immunity against damages need not be waived in RLUIPA, it having already been waived pursuant to a law enacted fourteen years earlier. Respondents have previously explained (see Supp. Br. 6-7) how this Court does not traditionally consider this kind of new claim, *see United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), and why this case lacks any reason for departing from the ordinary practice, see *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995). Accordingly, it is well within the Court's discretion not to address this claim as a matter of prudence.

Tellingly, the federal government responds that the Section 2000d-7 claim was adequately addressed below, because the panel opinion--which did not even acknowledge Section 2000d-7's existence—"relied in large part" on a Fourth Circuit decision (*Madison*) that "did consider and reject this argument." U.S. Amicus Br. 27-28 n.8. Under this view, any time a case is cited in an opinion—even for an entirely *separate* proposition, in a different section, involving different statutory authority--the court is deemed to have "addressed" it. That is senseless. The Court's reasons for requiring prior consideration of a claim are satisfied by actual, reasoned analysis of the question presented. That plainly has not occurred here.

III. IN LIGHT OF NEW CONCESSIONS FROM BOTH PETITIONER AND THE FEDERAL GOVERNMENT REGARDING THE PLRA, THE COURT MAY ALTERNATIVELY DISMISS THE WRIT AS IMPROVIDENTLY GRANTED

As the State explained in its brief in opposition (at 4-6) and supplemental brief (at 2-3), even if petitioner were to prevail on the question presented in this Court, any damages he would be authorized to pursue under RLUIPA would be immediately forbidden under the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e. Both petitioner and the federal government now apparently agree.

Under the PLRA, Congress categorically foreclosed prisoner suits seeking damages for non-physical injuries: "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. 1997e(e). And, in fact, the Fifth Circuit has already construed the PLRA to preclude any damages awarded for non-physical injuries under RLUIPA. See *Mayfield* v. *Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605-606 & n.8 (5th Cir. 2008) (finding it unnecessary to decide whether RLUIPA authorizes compensatory damages because the PLRA barred plaintiff's "claims for damages"); see also *Geiger* v. *Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (finding even constitutional claims under the First Amendment barred by the PLRA's "physical injury requirement"). Since petitioner has asserted only non-physical injuries here, see Pet. App. 2a-3a, the prevailing rule in the court below would preclude any compensatory

damages in this action, no matter how this Court ultimately resolves the question presented.

Both the federal government and petitioner have now acknowledged the inevitability of this outcome. For his part, petitioner (Br. 23) has recognized that "a principal purpose of the PLRA was to limit compensatory damage awards to prisoners." And the federal government (Br. 18) has explained that, absent a physical injury, "States will often be subject only to nominal damages" under RLUIPA after application of the PLRA. See also Becket Fund For Religious Liberty Amicus Br. 12 ("the PLRA bars the vast majority of suits for compensatory damages; thus as a practical matter RLUIPA primarily authorizes suits for nominal damages").

In light of these concessions, it is apparent that this case was effectively over before it began. In light of the controlling circuit law, it is clear how this case would be resolved upon any remand. Petitioner has not sought nominal damages, and it is far from obvious that this specific form of relief would be authorized, against a sovereign entity, under RLUIPA. Nor could the possibility of awarding punitive damages secure a meaningful, ongoing dispute, as punitive damages are unavailable as a matter of law under *Barnes* v. *Gorman*, 536 U.S. 181, 190 (2002).

This case was about, and clearly has always been about, compensatory damages—which petitioner is barred by the PLRA from receiving even if he is successful here. Because this case accordingly raises the question presented in only an academic sense—a fact brought into sharp relief after merits briefing—the Court may wish to consider dismissing the writ as improvidently granted.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the Court may wish to consider dismissing the writ of certiorari as improvidently granted.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID S. MORALES
Deputy First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Ho@oag.state.tx.us
(512) 936-1700

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REPLY BRIEF

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Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

WILSON EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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REPLY BRIEF FOR THE PETITIONER

Petitioner and the State agree on one thing. The phrase "appropriate relief" necessarily "asks whether damages relief would be appropriate *in this context*." Resp. Br. 18 (emphasis changed). But the relevant context is not, as Texas assumes, the context that would exist if the State had forgone federal funding. That would be an empty inquiry because, without the acceptance of funds, *no* relief would be appropriate, not even an injunction. Instead, the question is whether damages are appropriate to enforce a Spending Clause civil rights statute against a state that has already voluntarily surrendered much of its sovereign immunity in exchange for federal funds, consenting to be sued on the same terms as private entities and local governments that are subject to the same private right of action for the same "appropriate relief."

To be sure, even in this context, damages are an appropriate remedy only when the statute unambiguously provides for them. But that is true whether the defendant is a state, clothed in sovereign immunity, or a local government, protected by the limitations of the Spending Power. And in *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court concluded that two statutes materially indistinguishable from the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* – each also authorizing appropriate relief against funding recipients – unambiguously provided for damages remedies.

The State insists that this conclusion does not apply to state defendants under RLUIPA because

RLUIPA's open-ended statutory language permits courts to take into account a defendant's sovereign status in deciding what constitutes "appropriate relief." But that argument cannot be squared with this Court's decisions or the text of the statute. This Court has repeatedly construed the remedial scope of waivers by employing traditional tools of statutory construction to decide how a statute would apply to the ordinary defendants with whom a state has thrown its lot in exchange for federal funds. The sovereign status of the defendant is taken into account not *during* the process of statutory construction, but at the *end*, by resolving any remaining ambiguity in the sovereign's favor. In this case, ordinary tools of construction lead to the same result this Court reached in *Barnes*: if "appropriate relief" means anything, it means money damages.

In any event, the Rehabilitation Act Amendments of 1986 independently put the State on notice that it was subject to the same damages remedy as private defendants under any "statute prohibiting discrimination" by recipients of federal funds. 42 U.S.C. § 2000d-7. Texas is mistaken in asserting that Section 3 of RLUIPA is not a provision "prohibiting discrimination." Tellingly, the State admits that Section 3, *in fact*, pervasively prohibits discrimination. This is not, as the State would have it, an accident. The text and legislative history demonstrate that Congress crafted RLUIPA to both encompass the kind of discrimination that violates the First Amendment and to provide additional protection against failures to reasonably accommodate religious practices.

In this way, RLUIPA is indistinguishable from Section 504 of the Rehabilitation Act, which Section 2000d-7 specifically enumerates as a statute "prohibiting discrimination." Both Section 504 and RLUIPA reflect Congress's determination that sometimes, in order to provide equal opportunity to all, governments must treat differently situated people differently. This Court need not embrace that view of discrimination as a constitutional matter in order to acknowledge that RLUIPA is a "*statute* prohibiting discrimination" within the meaning of Section 2000d-7.

I. RLUIPA Unambiguously Warns States That The "Appropriate Relief" To Which They Are Consenting Includes Damages.

The State makes a seemingly simple argument: waivers of sovereign immunity must be clear; the words "appropriate relief" are not self-defining; therefore the phrase cannot authorize a damages remedy. Resp. Br. 18-19. But even the State cannot fully embrace its own argument. If "appropriate relief" is too ambiguous to authorize damages, it is also too ambiguous to encompass injunctions, declaratory relief, or indeed any remedy at all. Unwilling to admit that its consent to suits for "appropriate relief" was an empty promise, Texas seems to acknowledge that despite its "entirely question-begging" nature, Resp. Br. 18, RLUIPA's remedial provision must include at least prospective injunctive relief, *see* Resp. Br. 35.

That concession is well-founded, but incomplete. The remedial scope of a waiver of immunity is determined by applying ordinary tools of statutory

construction to decide which remedies are clearly encompassed by the statute. And RLUIPA's remedial provision, so construed, unambiguously embraces both equitable and legal relief. *See infra* Section I(B). But this case is even easier than that. This Court has already held, in *Barnes v. Gorman*, that damages are appropriate relief to enforce *any* Spending Clause statute. And the State has identified no convincing reason why that precedent does not apply to resolve this case.

A. The Court's Decision In *Barnes v. Gorman* Applies To State Recipients Of Federal Funds.

In *Barnes*, this Court held that a federal funding recipient is "on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including "compensatory damages." 536 U.S. at 187. The State seems to accept that in light of that holding, damages must be considered "appropriate relief" under RLUIPA as well, at least as applied to every other non state defendant. Resp. Br. 27. Texas argues, however, that the meaning of the single statutory phrase "appropriate relief" changes back and forth, meaning "no damages" for state defendants and "yes damages" for all others, even if they are both defendants in the same action. That vacillating meaning, the State argues, is compelled by the Eleventh Amendment and a passage in *Lane v. Pena*, 518 U.S. 187 (1996). It is not.

1. *The Decision In* Barnes *Did Not Turn On The Identity Of The Defendant As A Local Rather Than A State Government.*

Texas argues first that *Barnes* does not apply here because, unlike local governments, a state is subject to suit for damages only if its waiver of sovereign immunity "extend[s] unambiguously to such monetary claims." Resp. Br. 13 (quoting *Lane*, 518 U.S. at 192).

But the local governments in *Barnes* enjoyed the same protection, although it arose from the limits of the Spending Clause rather than from principles of sovereign immunity. Both the Eleventh Amendment and the Spending Clause prohibit subjecting defendants to damages actions absent their consent. *Compare Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (Spending Clause), *with Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (Eleventh Amendment). And as the State admits, Resp. Br. 31, this Court has implemented these identical constitutional protections through the same clear statement rule, intended to ensure that state and local governments alike may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17.

As a result, Texas is no different than the defendants in *Barnes*, who equally could have asserted that "monetary relief is distinctly *inappropriate* unless the text unmistakably says otherwise, not the other way around." Resp. Br. 19. Yet, this Court in *Barnes* concluded that Title II of the Americans with Disabilities Act and Section 504 – both of which, like RLUIPA, contained express

remedial provisions, which the Court construed to authorize "appropriate relief," *see* Petr. Br. 15 & n.6 – unambiguously authorize a damages remedy. *Barnes*, 536 U.S. at 187.

While Texas may disagree with that holding, it cannot distinguish it. To be sure, when a state consents to suit, it gives up a constitutional privilege other defendants do not enjoy. *See* Resp. Br. 31-32. But as long as a state has clearly agreed to damages suits, it makes no difference whether it otherwise could raise one constitutional objection to the trial or ten. It necessarily waives them all by accepting federal funds conditioned on submission to such suits. The only question is whether the condition is unambiguous, which turns on the clarity of the statute, not the identity of the defendants.

2. Lane v. Pena *Does Not Preclude Applying* Barnes *To States.*

The State nonetheless argues that *Lane v. Pena* precludes applying *Barnes* to a state. Resp. Br. 27-28. But the question of what constitutes appropriate relief against a sovereign was not even before the Court in *Lane* and, if anything, the decision supports the opposite conclusion.

In *Lane*, as in *Barnes*, this Court construed the enforcement provision of Section 504 of the Rehabilitation Act.[1] The question in *Lane*, however, was what kinds of federal agencies were appropriate *defendants*, not what kinds of remedies were

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[1] *See Lane*, 518 U.S. at 192, *Barnes*, 536 U.S. at 184-85.

appropriate *relief*. *See* 518 U.S. at 192-93. In fact, the Court expressed no doubt that if the defendant in *Lane* had been a "federal provider" of financial assistance, Section 504 would have authorized damages against it, consistent with the Court's later decision in *Barnes*. *See id.* at 191 (explaining that Section 504 expressly incorporates the remedies of Title VI, which "provides for monetary damages awards"); *id.* at 193 (holding that the Rehabilitation Act "does not, without more, establish that Congress has waived the Federal Government's immunity *beyond the narrow category of § 504(a) violations committed by federal funding agencies acting as such – that is, by 'Federal provider[s]'*") (emphasis added). Indeed, if the Court had believed, as Texas insists, that the language of the Act were too ambiguous to authorize damages against *any* sovereign defendant, the central question addressed by the Court – what kinds of federal agencies were subject to Section 504 remedies – would have been beside the point.

Thus, *Lane*'s statement that "the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* [*v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)] to actions against the Government," 518 U.S. at 196-97, cannot be read to imply that the Court was refusing to apply *Franklin*'s conception of appropriate relief to sovereign defendants. To the contrary, the Court relied on *Franklin* for the proposition that Section 504 authorized damages actions against appropriate federal defendants. *Id.* at 191 (citing *Franklin*, 503 U.S. at 70). Instead, the Court was simply rejecting Lane's assertion that *Franklin* supported inferring a cause of action against federal defendants who were

mentioned nowhere in the text of the waiver. *Id.* at 196.

Moreover, applying *Barnes* to a state is entirely consistent with *Lane*'s observation that "the available remedies" against the United States "are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." 518 U.S. at 196-97 (citation and internal quotation marks omitted). Petitioner does not ask this Court to imply an "appropriate remedies" clause into RLUIPA (as *Franklin* did for Title IX). RLUIPA's remedial provision is express.

The State is thus wrong to insist that petitioner's case depends on a presumption, imported from *Bell v. Hood*, 327 U.S. 678 (1946), that "all damages are available unless Congress expressly says otherwise." Resp. Br. 29. RLUIPA's express remedial provision renders the presumption entirely unnecessary here. Thus, petitioner does not rely on *Bell* at all, and he relies on *Franklin* only for the separate teaching, later confirmed in *Barnes*, that damages constitute "appropriate relief" for the violation of a Spending Clause statute. And, contrary to the State's insistence, the Court did not hesitate in *Lane* to apply that same understanding to a federal sovereign.

3. Barnes' *Analysis Comports With Eleventh Amendment Principles.*

The State suggests that *Barnes*' determination of what constitutes appropriate relief cannot apply to states because the Court employed a mode of interpretation – relying on an analogy to contract remedies – that is inconsistent with the form of

statutory analysis required by the Eleventh Amendment. Resp. Br. 27-31. Precedent forecloses that argument at every turn.

1. Because a waiver of sovereign immunity must be "unequivocal and textual," Resp. Br. 15 (citation omitted), Texas contends that a statute authorizing "appropriate" relief can never satisfy the sovereign immunity clear statement rule because, it says, the phrase "appropriate relief" is "entirely question-begging" and "offers no 'meaningful guidance' to courts or to the States," Resp. Br. 18 (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 & n.2 (1983)).

That argument, however, defies the very authority on which the State relies. In *Ruckelshaus*, after observing that the word "appropriate," standing alone, did not determine when attorney's fees should be awarded against the United States under the Clean Air Act, the Court followed the same analysis as *Barnes* – it looked to what awards were considered "appropriate" in similar suits involving private parties. *Ruckelshaus*, 463 U.S. at 683-86.

Likewise, in *West v. Gibson*, 527 U.S. 212 (1999), the Court did not conclude that the phrase "appropriate remedies" was too ambiguous to authorize compensatory damages against the federal government. Instead, the Court concluded that the phrase included damages in light of the statute's "language, purposes, and history." *Id.* at 217. The State insists that *West* recognized a damages remedy because "Congress *explicitly* made damages available in the text of the statute." Resp. Br. 23. But that is simply not true. While the text of Title VII explicitly provided for compensatory damages in *lawsuits* by

private plaintiffs, that provision said nothing about the remedies available in administrative proceedings. *See West*, 527 U.S. at 220-21 (noting that the litigation provision "says nothing about the EEOC"); *id.* at 222 (declining to decide whether litigation waiver was sufficient to waive immunity to damages in administrative proceedings).

2. In fact, the Court has repeatedly explained that once a sovereign has voluntarily submitted to suit, courts must apply ordinary principles of statutory construction to construe the scope of a sovereign's waiver. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589-90 (2008) (collecting cases); *see also, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008) (looking to legislative history and the Court's prior cases construing similar language to determine scope of federal waiver under Age Discrimination in Employment Act); *Orff v. United States*, 545 U.S. 596, 602-04 (2005) (drawing on prior judicial understanding of term of art and the Federal Rules of Civil Procedure to analyze federal waiver under Reclamation Reform Act); *United States v. Williams*, 514 U.S. 527, 532 (1995) (construing federal waiver in light of the "broad common-law remedy the statute displaced"); *Ardestani v. INS*, 502 U.S. 129, 136-37 (1991) (considering legislative purpose to analyze waiver of federal immunity in administrative proceedings under Equal Access to Justice Act); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (reading federal waiver to encompass judicially developed doctrine of equitable tolling); *Ruckelshaus*, 463 U.S. at 686-93 (considering "historic fee-shifting principles" and legislative

history to construe federal waiver under Clean Air Act).

Sovereignty is respected not by jettisoning established principles of statutory construction, but by resolving any ambiguity that remains at the end of the statutory analysis in the sovereign's favor. *Richlin*, 553 U.S. at 589-90.[2]

Barnes thus did not depart from sovereign immunity principles by relying on an analogy to private contract remedies. To the contrary, in looking to analogs, the Court has repeatedly asked whether a *private party* would be liable for monetary relief, not – as Texas would have it – whether the relief would be appropriate against an unconsenting sovereign. *See, e.g.*, *Richlin*, 553 U.S. at 580-82 (looking to treatment of paralegal costs under analogous fee-shifting statutes, as applied against non-sovereign defendants, to define the scope of the United States' waiver for attorney's fees); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003) (analogizing to private trust law to determine damages were available against United States); *Ruckelshaus*, 463 U.S. at 683-84 & nn.3-5 (looking to analogous statutes authorizing fee awards against non-sovereign defendants to determine when

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[2] The Court has applied a more stringent test in determining whether a sovereign has consented to suit at all. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682-84 (1999); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). But Texas does not dispute that the text of RLUIPA meets that test. *See* Resp. Br. 14; *see also* 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4)(A)(i).

fee awards are "appropriate" against United States); *cf. Gomez-Perez*, 553 U.S. at 487-88, 490 n.6 (relying on interpretation of "discrimination" in private race discrimination cases to find that federal government's waiver of immunity to age "discrimination" suits encompasses retaliation claims).[3]

Thus, this Court has recognized that damages are an appropriate remedy against the United States for breach of contract – even though neither the Tucker Act nor any other federal statute specifically authorizes that relief – because damages are a traditional remedy in private contract suits. Petr. Br. 33-34. Having consented to private contract litigation, the federal government could hardly argue, as the State does here, that its sovereign status should be taken into account to render ordinary contract remedies inappropriate. By the same token, in consenting to suit for "appropriate relief" for violations of a Spending Clause contract, Texas

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[3] In some instances, there will be no relevant analog to which the Court could turn. *See, e.g., United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1991) (construing Bankruptcy Act). And the appropriate analog obviously depends on context – the contract analogy applied in *Barnes*, for example, would have no application to a statute that unilaterally waives a sovereign's immunity. *See* Petr. Br. 31-33. The contract analogy thus did not apply in *Lane*, not because the case involved a *federal* defendant, *contra* Resp. Br. 28, but because it involved a *unilateral* waiver of immunity. The analogy would be equally inapt to construe a state statute unilaterally waiving Eleventh Amendment immunity.

unambiguously agreed to traditional contract remedies for violations of RLUIPA.

Texas claims that the federal contracting example is inapt, arguing that the Tucker Act itself implicitly creates a cause of action for breach of contract damages. Resp. Br. 32-34. But this Court has repeatedly recognized that the Tucker Act does not create any cause of action or authorize any form of relief. *See, e.g., Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 465 n.5 (1980) (explaining that the Act is "only a jurisdictional statute . . . and does not create a substantive right to money damages"). Indeed, if the Tucker Act created a cause of action for damages for every category of claim enumerated in the statute, it would create a right of damages against the United States for the violation of "any Act of Congress," 28 U.S.C. § 1491(a)(1), even if the underlying statute itself provided no such relief. But this Court has repeatedly rejected that proposition. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 216 (1983) (requiring plaintiff to demonstrate that the statute authorizes a damages claim against the federal government).

B. The Text, Context, And Purposes Of RLUIPA Confirm That "Appropriate Relief" Includes Damages Actions Against States.

Texas suggests that even if *Barnes* generally applies to states under other Spending Clause statutes, RLUIPA is different because its use of the word "appropriate" allows for variable treatment of different kinds of defendants. Resp. Br. 18-19. But that argument is inconsistent with the Court's

general approach to resolving the remedial scope of waivers, which asks what relief is clearly authorized against non-sovereign defendants in order to determine what remedies the sovereign has accepted by submitting to suit on par with other defendants. *See supra* at 11-13. Moreover, the text, structure, and purposes of RLUIPA belie any suggestion that Congress intended to give states special dispensation from the damages remedy that applies to every other RLUIPA defendant.

First, by the time Congress enacted RLUIPA, this Court had used the phrase "appropriate relief" as shorthand to describe the set of remedies presumptively available to enforce Spending Clause civil rights statutes, which includes damages. *See* Petr. Br. § I.A. The State points out that the phrase "appropriate relief" was also used in RLUIPA's immediate predecessor, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, which is not a Spending Clause statute. Resp. Br. 23. True enough. But that proves nothing about what "appropriate relief" meant under RFRA,[4] and it proves even less about what "appropriate relief" means when it is used in legislation self-consciously modeled on other Spending Clause civil rights legislation, a context in which the phrase has a well-established meaning under this Court's precedent. *See* Petr. Br. 14; *Joint Statement of Senator Hatch*

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[4] Texas implies that damages were not considered "appropriate relief" against states under RFRA, Resp. Br. 6-7, but cites only a single case against the federal government, decided six years after RLUIPA was enacted, Resp. Br. 20.

and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. 16,698, 16,699 (2000) ("The Spending Clause provisions are modeled directly on similar provisions in other civil rights laws.").[5]

Second, Texas's reading of "appropriate relief" ignores the longstanding tradition in the law that damages, rather than equitable relief, are the presumptively appropriate (and sufficient) remedy for the violation of individual rights. *See* Petr. Br. 21. Nor does Texas even acknowledge that Congress has consistently authorized damages as an appropriate remedy for violations of federal civil rights statutes, even against states. *See* Petr. Br. 18-19.

Third, Texas seems to acknowledge that "appropriate relief" must mean *something* – otherwise there would be no point to subjecting states to suit – and so accepts that the phrase includes equitable and declaratory relief. But that makes the

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[5] The State points to several statements made by witnesses in support of an unenacted predecessor to RLUIPA, to the effect that the prior bill would not "abrogate" states' sovereign immunity. Resp. Br. 6-7 & nn.1-2. When those comments were made, Congress had recently removed a provision from the bill that would have unilaterally abrogated states' immunity to certain RLUIPA claims whether the state accepted federal funds or not. *Compare* H.R. 1691, 106th Cong. § 4(a) (1999), *with* H.R. 4019, 105th Cong. § 4(d)(1) (1998). The witnesses' apparent belief that this amendment precluded any finding of unilateral abrogation says nothing about whether the subsequent Congress that enacted RLUIPA intended to condition receipt of federal funds on a state's voluntary waiver of immunity to damages claims.

cause of action entirely redundant because injunctive and declaratory relief are already available against state officials in their official capacities. *See* 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4)(A)(ii); *see generally Ex parte Young*, 209 U.S. 123 (1908). This Court, however, does not treat statutory language as a redundancy "with no job to do, and [that] accordingly accomplishes nothing." *Doe v. Chao*, 540 U.S. 614, 623 (2004).

Moreover, when Congress intended to limit relief to equitable remedies, it said so expressly. *See* 42 U.S.C. § 2000cc-2(f) (authorizing federal government to bring suits for "injunctive or declaratory relief"). That Congress went further in Section 2000cc-2(a), and authorized all "appropriate relief" against states, thus necessarily authorizes more than injunctive relief because, as Texas says, "Congress did not use different language in adjacent sections of the same act because it intended for them to mean the same thing." Resp. Br. 40. Texas tries to explain this anomaly away as a congressional effort to prevent the United States from obtaining damages when it sues states. Resp. Br. 24-25. But the federal suit provision limits *all* suits by the United States, not simply suits against states. Thus Congress's remedial limitation cannot be attributed to a concern unique to states.

In fact, Section 2000cc-2(f) proves the opposite of what Texas argues. It shows that Congress decided to subject states and local governments to the *same* remedies in suits brought by the United States, just at it chose to include states and local governments in a common definition of the term "government," 42 U.S.C. § 2000cc-5(4)(A)(i), and to subject all

"government" defendants, state and local, to the same private cause of action for the same "appropriate relief," *id.* § 2000cc-2(a). The constant thread throughout RLUIPA is remedial equivalency between states and all other defendants – the exact opposite of Texas's insistence that the same words "appropriate relief" can have dramatically different meanings depending on the identity of the litigant. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (different constitutional concerns raised by different parties "cannot justify giving the *same* detention provision a different meaning").

Fourth, the State's cramped reading of "appropriate relief" cannot be reconciled with the statute's purposes. Indeed, it is in the custodial setting in particular that equitable remedies are commonly least effective due to the frequent mooting of cases by prisoner transfers or releases. *See, e.g.*, Brief of Becket Fund §§ II(B)-(D). The State's argument also ignores that RLUIPA was enacted not simply to stop ongoing violations of federal law, but also to provide victims of unlawful conduct "relief" for their injuries. 42 U.S.C. § 2000cc-2(a). In fact, Congress has repeatedly authorized make-whole remedies in civil rights statutes like RLUIPA, even against states. *See* Petr. Br. 19. There is no basis to believe that Congress intended RLUIPA, alone among modern civil rights statutes, to leave victims without compensation for the violation of their fundamental statutory rights.

II. The Rehabilitation Act Amendments Of 1986 Separately Put The State On Notice That Acceptance Of Federal Funding Would Constitute Consent To RLUIPA Damages Suits.

Even apart from the notice provided by RLUIPA itself, the Rehabilitation Act Amendments of 1986 left the State no room to doubt that accepting federal funds would subject it to damages suits under RLUIPA.[6]

A. Section 3 Of RLUIPA Is A Provision Of A Statute Prohibiting Discrimination, Even Under Respondents' Narrow Definition Of "Discrimination."

1. Section 3 is a provision that prohibits "discrimination," even under the State's definition of the term. After all, the State does not deny that Section 3 prohibits treating similarly situated inmates differently because of their religion. Texas appears to concede (Resp. Br. 44-45), for example, that a state would violate Section 3 if it were to provide kosher food to Jewish inmates while simultaneously denying a vegetarian diet to Seventh Day Adventists because of their religion. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005). Indeed, the State is unable to identify any example of religious "discrimination" as it understands the word

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[6] Petitioner is not barred from raising this additional argument in support of his general claim that damages are available against the State. *See* Pet. 32 n.10; Pet. Reply 10-11. *Contra* Resp. Br. 47 n.6.

that is *not* prohibited by Section 3. It is thus difficult to understand respondents' insistence that Section 3 is not a provision of a statute "prohibiting discrimination." 42 U.S.C. § 2000d-7(a)(1).

The State's only response is to claim that although Section 3 does prohibit discrimination, it does so only by "happenstance," in the same way an arson statute might, on rare occasion, punish a racially motivated church burning. Resp. Br. 44-45. That analogy bears no resemblance to Section 3's textual or practical operation.

For one thing, Section 3's proscription of the most basic and invidious forms of religious discrimination is hardly the occasional accident the State's analogy suggests. In fact, this Court recognized in *Cutter* that Congress enacted RLUIPA in reaction to a record that included not only unreasonable refusals to accommodate, but also acts of unequal treatment against disfavored religions. *See Cutter*, 544 U.S. at 716 n.5; Petr. Br. 40. It is inconceivable that Congress would have responded to that record with a statute that reached neutral rules but not the most egregious forms of religious discrimination.[7] Texas points to no other civil rights statute that prohibits *only* conduct outside the scope of the relevant constitutional protection.

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[7] Although such conduct is also prohibited by the First Amendment, only RLUIPA's substantial burdens provision provides institutionalized persons a cause of action against a state for such violations. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (states not subject to suit under 42 U.S.C. § 1983).

RLUIPA's text also belies the central premise of the State's argument – *i.e.*, that Section 3 is targeted solely at neutral rules of general applicability. Resp. Br. 36, 41-44. By its terms, Section 3 prohibits unjustified burdens on religious exercise "*even if* the burden results from a rule of general applicability," 42 U.S.C. § 2000cc-1(a) (emphasis added), thereby making clear that the provision is not limited to requiring accommodations to neutral rules, but reaches other forms of discrimination as well.

Likewise, the statute shifts the burden of persuasion to the defendant if "a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of [Section 2]." 42 U.S.C. § 2000cc-2(b). Thus, Congress structured the statute around its expectation that some conduct violating Section 3 would also violate the Free Exercise Clause, which, the State acknowledges, prohibits "discrimination," however narrowly defined. *See* Resp. Br. 5, 43.

In addition, the State is wrong to assert that Section 3 never requires plaintiffs to prove unequal treatment in order to establish a violation. *See* Resp. Br. 5, 45. If, for instance, prison officials were to put all Muslim inmates in administrative segregation, undoubtedly the inmates' practice of religion would be substantially burdened, and Section 3 therefore violated, even if the inmates were allowed to practice all the tenets of their faith while in lockdown. The inmates' RLUIPA claims would depend entirely on proof that the unequal imposition of harsh conditions that, while not preventing them from engaging in religious practices, nonetheless imposed a substantial burden because it inflicted a secular cost on the

inmates' adherence to their faith. *See, e.g.*, *McAlister v. Livingston*, 348 Fed. Appx. 923, 936-37 (5th Cir. 2009). Disparate application of a prison rule is also relevant to whether the challenged practice is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2); *see, e.g.*, *McAlister*, 348 Fed. Appx. at 937 (non-neutral application of prison rule "call[s] into question whether the [imposition] is narrowly tailored to the [prison's] asserted interests") (citation and internal quotation marks omitted).

2. The State nonetheless argues that Section 3 cannot prohibit discrimination within the meaning of Section 2000d-7 because a different provision of RLIUPA, Section 2, addresses "substantial burdens" and "discrimination" in separate subparagraphs. Resp. Br. 39-40.

The State is incorrect. Congress did not enact Section 2(b)'s "Equal terms" and "Nondiscrimination" provisions because it believed that such discrimination fell outside the scope of Section 2(a)'s "Substantial burdens" protection. Instead, Section 2(b) extends a subset of Section 2(a)'s broad prohibition against discrimination to *all* state and local governments (even those that do not accept federal funding) pursuant to Congress's power to enforce the Fourteenth Amendment.[8] By breaking

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[8] *Compare* 42 U.S.C. § 2000cc(a)(2) (applying "Substantial burdens" provision only to states that accept federal funds, whose challenged actions affect interstate commerce, or who impose the burden while administering a system of individualized assessments), *with id.* 2000cc(b) (applying

out only claims that universally involve unconstitutional intentional discrimination, Congress ensured that its extension of Section 2 to all state and local governments would pass muster as a proper exercise of its legislative power under Section 5 of the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507 (1997). That does not mean that Section 2(a) is not also an anti-discrimination provision. It simply means that it is not confined to *facially unconstitutional* intentional discrimination like Section 2(b).

3. Finally, the State suggests that even if Section 3 prohibits discrimination, it is not a provision "prohibiting discrimination" within the meaning of Section 2000d-7 because it also requires reasonable accommodations. Resp. Br. 41-42. Pointing to the list of statutes specifically enumerated in Section 2000d-7, the State insists that Congress intended the catchall to include only statutes that "focus" on discrimination narrowly construed, and to exclude statutes that both prohibit discrimination and "attack neutral laws of general applicability." Resp. Br. 41. That is wrong for two reasons.

First, the statute does not refer to provisions "prohibiting *only* discrimination," and a provision that pervasively prohibits discrimination and other conduct that creates a risk of discrimination is still a

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"Equal terms" and "Nondiscrimination" provisions to all governments).

provision "prohibiting discrimination" under any reasonable understanding of that language.

Second, the State's construction is incompatible with Congress's express enumeration of Section 504, which this Court has recognized prohibits both "intentional discrimination" against individuals with disabilities and failure to make reasonable accommodations. *See* Petr. Br. 41-42. RLUIPA focuses no less on discrimination, narrowly construed, than does Section 504, which the State must concede is a statute "prohibiting discrimination."

B. RLUIPA's Accommodation Mandate Prohibits Discrimination Within The Meaning Of Section 2000d-7.

Texas is, in any event, incorrect to insist that a statute requiring reasonable accommodations is not a "statute prohibiting discrimination" within the meaning of Section 2000d-7.

The State's argument relies entirely on a constitutional definition of discrimination, when the operative question is whether RLUIPA is a "*statute* prohibiting discrimination." 42 U.S.C. § 2000d-7(a)(1) (emphasis added). And it is uncontested that however the Constitution might conceive of "discrimination," Congress regularly uses the term more broadly, including to encompass failing to accommodate a particular practice or trait. *See* Petr. Br. 41-43. Texas thus ignores that the "discrimination" prohibited by Title VII includes unreasonable refusals to accommodate religious practices, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986), and that in enacting the

Americans with Disabilities Act, Congress took a "comprehensive view of the concept of discrimination," which embraces denials of reasonable accommodations, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999); *see* 42 U.S.C. § 12101(a)(5); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (statute that "calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices" is reasonably "perceive[d] . . . as an anti-discrimination law").

Most significantly, the State cannot escape that Section 504 likewise defines "discrimination" to encompass both invidious discrimination and unreasonable failures to accommodate. *See* Petr. Br. 41-42. Instead, Texas argues that under the canon of *ejusdem generis* the Court should ignore Section 504's more expansive conception of discrimination and limit Section 2000d-7's catchall to statutes that prohibit only the "core conduct" (*i.e.*, "intentional discrimination") that is the sole object of four of the five statutes enumerated in Section 2000d-7. Resp. Br. 41-42. But it would be an odd application of the canon to conclude that even though it is enumerated in the text, Section 504 does not itself qualify as a statute "prohibiting discrimination." While a catchall should not be given "unintended breadth," Resp. Br. 41 (citation and internal quotation marks omitted), it must at least encompass the enumerated examples. *See, e.g., Cleveland v. United States*, 329 U.S. 14, 16-18 (1946).

Unless the Court is prepared to declare that Section 504 is not a statute "prohibiting

discrimination" within the meaning of Section 2000d-7, the inescapable conclusion is that the materially indistinguishable requirements of RLUIPA's Section 3 also fall within the scope of the State's waiver.[9]

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[9] In its final gambit, the State asks the Court to dismiss this case as improvidently granted, purporting to find an excuse to rehash its certiorari-stage argument in petitioner's alleged concession that his damages claims are precluded by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997(e). Resp. Br. 48-49. Not so. While petitioner acknowledges that the PLRA limitations on "mental" and "emotional" injuries apply to RLUIPA claims, Petr. Br. 22-23, he has consistently maintained in this Court that those limitations do not restrict damages for the violation of religious freedom. Pet. Supp. Br. 7. Nor has petitioner ever accepted the State's unsupported assertion, Resp. Br. 49, that a pro se litigant's failure to separately request nominal (in addition to compensatory) damages bars that relief.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

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SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

The Solicitor General rightly acknowledges that the petition in this case presents a question meriting this Court's plenary review. But she is wrong in urging this Court to ignore the court of appeals' constitutional invalidation of RLUIPA's authorization of individual-capacity damages. This Court's longstanding practice is to grant review of decisions holding Acts of Congress unconstitutional, and the Solicitor General offers no sound basis for departing from that tradition here. The petition should be granted in its entirety.

I. The Court Of Appeals' Decision Partially Invalidates An Act Of Congress, And Thus Warrants Full Review.

The Solicitor General makes no effort to explain why review of the court of appeals' Spending Clause holding is not warranted under the Court's – and the Solicitor General's – traditional presumption in favor of review of decisions invalidating Acts of Congress on constitutional grounds. In fact, the arguments made in the Government's brief counsel in favor of, not against, this Court's review of the court of appeals' partial invalidation of RLUIPA's remedial provisions.

1. Although the court of appeals expressed its decision in statutory construction terms, there is no escaping that it refused to give effect to the plain meaning of the statute only because it believed Congress lacked the constitutional power to enact the statute as written.

The Solicitor General agrees with petitioner that RLUIPA, by its terms, "plainly authorizes suits against state officials in their individual capacities." U.S. Br. 11. Indeed, to construe the statute differently would render surplusage the inclusion of government officials in its definition of "government." *See* Pet. Reply 7-8. While public officials are sometimes sued in their official capacities for injunctive or declaratory relief under other statutes (*e.g.*, 42 U.S.C. § 1983), such actions are treated as suits against the governmental entity and are used only as an expedient to end an ongoing violation of federal law in the absence of a cause of action against the government itself. *See, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Under RLUIPA, that expedient is unnecessary because all agree that the statute permissibly authorizes suits for injunctive and declaratory relief directly against governmental entities. *See* Pet. App. 14a. Consequently, the *only* purpose for Congress to have authorized suits against public officials in addition to governmental entities is to permit personal capacity suits for damages. *See* Pet. 7-8.

The Solicitor General further agrees that the court of appeals refused to enforce the statute as written solely because of its erroneous interpretation of the Constitution and this Court's decisions. *See* U.S. Br. 12 (explaining that the court of appeals refused to give RLUIPA's text its clear meaning because, in the court's view, "Congress lacks constitutional authority to impose liability on an entity other than the fund recipient for violations of conditions on federal funds") (citing Pet. App. 17a-20a).

Had the Fifth Circuit expressed that conclusion in more direct terms, by acknowledging that RLUIPA authorizes individual capacity suits and holding the statute unconstitutional in that respect, there would be no question that the Spending Clause issue required this Court's review. Indeed, the Solicitor General commonly petitions for certiorari when a court of appeals "partially invalidates an Act of Congress," arguing that the invalidation "alone warrants this Court's review." U.S. Pet. 26, *United States v. Juvenile Male*, No. 09-940; *see also, e.g.*, U.S. Pet. 18, *Kempthorne v. Buono*, No. 08-472; U.S. Pet. 18, *Mukasey v. ACLU*, No. 08-565. Moreover, this Court regularly grants such petitions, even when, as here, the Government acknowledges that there is no direct, considered circuit conflict. *See, e.g.*, *United States v. Stevens*, 129 S. Ct. 1984 (2009); *Salazar v. Buono*, 129 S. Ct. 1313 (2009); *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *United States v. Morrison*, 529 U.S. 598 (2000); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

While the court of appeals gave effect to its constitutional conclusion through an implausible construction of the unambiguous statutory language, a constitutional decision need not be expressed in terms in order to warrant this Court's review. For example, in *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), the Ninth Circuit refused to give effect to a statute conveying ownership of a parcel of federal land containing a war memorial to a veterans group, on the ground that conveyance required by the statute was inconsistent with a prior injunction. *See id.* at 1081-87. Although the court of appeals had not directly held the statute unconstitutional, the Solicitor General nonetheless petitioned for certiorari

on the ground that the "court of appeals rendered invalid an Act of Congress by affirming the district court's permanent injunction barring the government 'from implementing the provisions of [the Act].'" U.S. Pet. 18, *Kempthorne v. Buono*, No. 08-472. The Government explained that the "invalidation of an Act of Congress is ordinarily a sufficient ground to warrant this Court's review, and the backhanded manner in which the Ninth Circuit invalidated – by refusing to give effect to – the Act in this case calls for no different treatment." *Id.* at 18-19. The Court granted the petition. 129 S.Ct. 1313 (2009).

This case calls for no different treatment. The Fifth Circuit refused to give effect to RLUIPA's express provision of a private right of action against government officials. The backhanded manner in which it expressed its constitutional conclusion – by giving the statute a construction incompatible with its plain text and established meaning in other federal laws – should not derail this Court's review. As with any other decision invalidating a federal statute on constitutional grounds, Congress is powerless to alter the Fifth Circuit's alleged interpretation of RLUIPA because of the constitutional considerations that drove the court of appeals' ruling. If the decision below is wrong, only this Court can correct it.

2. As the Solicitor General explains, the constitutional ruling below *is* wrong, *see* U.S. Br. 11-13, which further warrants this Court's intervention.

It is one thing for the Court to deny review in the face of a uniformly correct consensus among the circuits; it is quite another to permit an erroneous constitutional theory to spread unabated among the

courts of appeals, threatening the enforcement of not only RLUIPA, but other Spending Clause statutes as well. *See* Pet. 19-20. As the petition explained – and the Solicitor General tellingly does not disagree – the holding here directly draws into question the constitutionality of 18 U.S.C. § 666. *See* Pet. Reply 4-5. It could also be used to challenge provisions of the Hatch Act, 5 U.S.C. §§ 1501 *et seq.*, which place a variety of limitations on the personal political activities of a "state or local officer or employee" of certain federal funding recipients, *see id.* § 1501(4), 1502, the violation of which can lead to an order by the Merit Systems Protection Board that the employee be terminated from her employment, *id.* § 1505.

II. That Four Circuits Have Now Adopted A Fundamentally Erroneous Construction Of Congress's Spending Clause Authority Is A Compelling Reason To Grant Review, Not To Deny It.

The Solicitor General nonetheless recommends that the Court deny review of the Fifth Circuit's Spending Clause ruling "because there is no division among the courts of appeals on that issue." U.S. Br. 9. "To date," she notes, "four courts of appeals have considered" the question and all four have reached the same erroneous conclusion. *Id.* But the fact that four courts of appeals have invalidated a provision of a federal statute provides even greater reason to grant the petition, not a reason to allow the creeping nullification of a congressional enactment to expand.

The Solicitor General does not contend that all four courts of appeals will actually correct course without this Court's intervention. Instead, she

suggests only that a decision on the Eleventh Amendment question "may influence how courts of appeals determine going forward whether damages are available under RLUIPA against state officials sued in their individual capacities." U.S. Br. 14. Just why that would be, she does not say, and it is far from self-evident. The Eleventh Amendment question turns on whether states are on notice of the damages remedy, whereas the Spending Clause question turns on the scope of Congress's enumerated powers and the Necessary and Proper Clause. *Compare* U.S. Br. 11-13 (discussing Spending Clause question) *with* U.S. Br. 7-19, *Cardinal v. Metrish*, No. 09-109 (discussing Eleventh Amendment issue). Moreover, even if this Court's decision might (for some unknown reason) "influence" courts' analysis of the Spending Clause question, the Solicitor General does not go so far as to argue that it would inspire four courts of appeals to abandon binding circuit precedent.

There is no reason to deny review of a constitutional problem that is only going to get worse. Further percolation will not contribute to this Court's resolution of a straightforward constitutional question, given that the Court already has the benefit of the views of four courts of appeals, the parties in those cases and this, and the solicitors general of Texas and the United States. No one has suggested that delay will produce additional arguments that have not already been identified by these decisions or parties.

The Solicitor General agrees that certiorari is warranted in *Cardinal* to review the closely related question of the states' amenability to suit under the

statute. *See* U.S. Br. 8. The Court should grant the petition in this case as well in order to allow a comprehensive determination of the Act's application to all government defendants. The Solicitor General's contrary recommendation will simply result in piecemeal litigation that ultimately serves no one.

III. The Solicitor General's Suggestion That This Case Is A Poor Vehicle Is Unconvincing.

The only other reason the Solicitor General gives for denying review of the Spending Clause issues is a passing suggestion that petitioner's damages *might* be limited by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e). *See* U.S. Br. 14. Tellingly, she does not, in fact, dispute petitioner's showing that the PLRA's restriction on damages for "mental or emotional" injuries, 42 U.S.C. § 1997e(e), does not apply to suits alleging a violation of religious freedom. *See* Pet. Reply Br. 10; *see also Cardinal* Reply Br. 6-8. Moreover, the mere possibility that respondents might have an alternative defense that would limit liability is no reason to deny review of the case on the grounds actually decided.

Nor does the Government deny that even if the PLRA applied, petitioner would be entitled to at least nominal damages. *See* U.S. Br. 14. That relief would be far from meaningless. Even nominal damages represent a vindication of a prisoner's claim that his federal rights have been violated and provide guidance to institutions on their obligations under the Act. *Cf. Carey v. Piphus*, 435 U.S. 247, 266 (1978) (noting that the law provides for nominal damages in order to "recognize[] the importance to organized

society that [certain] rights be scrupulously observed").

Furthermore, in this context, nominal damages can play an even more consequential role. Here, because the Eleventh Amendment and Spending Clause prevented any award of even nominal damages, the court held that the State's discontinuation of its cell restriction policy insulated the prison's conduct from all judicial scrutiny. *See* Pet. App. 13a-35a (holding that voluntary cessation rendered claims for injunctive and declaratory judgment moot, that Eleventh Amendment precluded damages award against the State, and that Spending Clause precluded suit against prison officials in their individual capacities). Other courts routinely apply the same rule, dismissing RLUIPA claims without considering their merits after finding that all monetary relief is precluded by the Constitution and that claims for injunctive or declaratory relief were mooted by the prison's cessation of the allegedly unlawful practice, the prisoner's transfer to another facility, or his release from custody. *See, e.g.*, *Nelson v. Miller*, 570 F.3d 868, 883, 885 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *Cardinal v. Metrish*, 564 F.3d 794, 798-801 (6th Cir. 2009), pet. for cert. pending, No. 09-109; *Berryman v. Granholm*, 343 Fed. Appx. 1, 3-4 (6th Cir. 2009); *Harris v. Schriro*, 652 F. Supp. 2d. 1024, 1028-33 (D. Ariz. 2009).

That result demonstrates both the significant practical consequences of the Fifth Circuit's Spending Clause holding and the decision's implausibility as a matter of statutory construction. Under the court of appeals' view, in a great many cases, a statute that

authorizes "appropriate relief," 42 U.S.C. § 2000cc-2, against every conceivable defendant, in fact authorizes *no* relief against *any* defendant, regardless of the injuries suffered. The Fifth Circuit's view of the Constitution has thus resulted in a hobbled and barely recognizable version of the statute Congress enacted. That decision should be reviewed by this Court, and the petition granted in its entirety.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

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In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
James.Ho@oag.state.tx.us
(512) 936-1700

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If the U.S. invitation brief were a petition for a writ of certiorari, it would warrant a clear and obvious denial. The U.S. has recommended that the Court grant review in *Cardinal* v. *Metrish*, 564 F.3d 794 (6th Cir. 2008), petition for cert. pending, No. 09-109 (filed July 22, 2009), and hold *Sossamon* pending *Cardinal*'s disposition, in order to resolve whether RLUIPA authorizes damages suits against the States. As its lead argument on the issue, however, the United States presses a theory based on a *different* statute (42 U.S.C. 2000d-7) that was never raised, much less actually resolved, in either *Cardinal* or *Sossamon* below. There is no circuit split over Section 2000d-7 in this setting, and the U.S. has not suggested otherwise. Indeed, only two circuits have even addressed the issue, and both have explicitly *rejected* the Federal Government's view.

The U.S. is accordingly inviting this Court to be only the third appellate tribunal in the nation to review this question—and the very first to adopt the Federal Government's position. It would be remarkable, to say the least, to grant review on a splitless statutory issue, of limited practical importance, using a vehicle where the issue was not even pressed or passed upon below.

That alone is a sufficient and compelling basis for a denial. But it is only one of several serious problems undercutting these petitions. As for *Sossamon*, the U.S. correctly recognizes that petitioner faces an

insurmountable defect in the PLRA. As for *Cardinal*, one of the three panelists below declared the case so "woefully underdeveloped" that the judge considered it an inappropriate vehicle for resolving the damages question *even at the circuit level*. It follows *a fortiori* that this is a woefully deficient vehicle for deciding the same question, on the same record, on a nationwide basis in this Court.

The U.S. was incorrect to recommend a grant in *Cardinal*, and accordingly it was also incorrect to recommend a hold in *Sossamon*. Both petitions should be denied.

A. Both *Sossamon* And *Cardinal* Are Poor Vehicles

1. As confirmed by the U.S. (Br. 8-9), the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(e), independently bars any damages otherwise available in *Sossamon*. Even were this Court to grant in *Cardinal* and adopt the Eleventh Circuit's outlier approach, the PLRA would still immediately forbid the very damages that RLUIPA would otherwise allow—as the Eleventh Circuit itself has determined. See *Smith* v. *Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

It follows that, although the U.S. was correct to identify a substantial vehicle problem based on this "ancillary and difficult question" (Br. 9), it was incorrect to suggest that *Sossamon* should be held at all. There is no point in remanding for the Fifth Circuit to reconsider the damages question when it is already clear that petitioner's non-physical injuries are categorically ineligible for monetary relief. See, *e.g.*,

Mayfield v. *Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605-606 & n.8 (5th Cir. 2008).

Nor can petitioner avoid this bar by seeking nominal or punitive, rather than compensatory, damages. Even assuming the PLRA allows that kind of relief, his complaint only sought compensatory damages, as both the district court (Pet. App. 37a) and the Fifth Circuit (Pet. App. 5a, 15a n.24) recognized. It is much too late for petitioner to attempt to recast his complaint before this Court. In addition, punitive damages are not only presumptively unavailable against governmental entities, see, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181, 190 (2002), but there is no indication that petitioner's claims—which the district court *rejected* on the merits, Br. in Opp. 8—could satisfy the high standard for punitive damages.

2. There are also substantial vehicle problems in *Cardinal*—and those problems are apparent on the face of the Sixth Circuit's decision. The U.S. acknowledges (Br. 6 n.4) that Judge Clay wrote separately because he did not wish to resolve the RLUIPA damages question in that case. *Cardinal*, 564 F.3d at 803-804 (Clay, J., concurring). But the U.S. did not discuss *why* Judge Clay reached that conclusion. His rationale is telling. He directly questioned whether the case served as a "suitable" vehicle for deciding this issue even at the *circuit* level: he cited the "woefully underdeveloped" record, the lack of any meaningful and adequate appellate briefing, the possibility of critical factual disputes, and a serious doubt that "Cardinal has raised a cognizable claim under RLUIPA" in the first place. See *ibid.*

Nor are these concerns merely theoretical. The U.S. contends (Br. 22) that Cardinal alleged a sufficient physical injury to escape the scope of the PLRA. But it is not clear, as a preliminary matter, that weight loss itself (or its attendant effects) is necessarily the kind of physical injury contemplated by the PLRA. See, *e.g.*, *Pearson* v. *Welborn*, 471 F.3d 732, 744 (7th Cir. 2006). And even assuming Cardinal's weight loss constitutes a physical injury, Judge Clay identified a series of factual issues that might prove the weight loss was not directly caused by the prison policy itself. See 564 F.3d at 804.

In addition, in its current posture, Cardinal has not established a clear RLUIPA violation. According to petitioner's own account, the warden undertook a concerted effort to redress his grievance at the earliest practicable moment. See 564 F.3d at 796 & n.1. Cardinal's own misconduct (and the need to place him in temporary segregation) caused his original transfer away from a facility that served kosher meals; once his request at the new facility was elevated to the appropriate decisionmaker—who undoubtedly has many competing responsibilities demanding attention--his request was granted the very next day, and immediate action followed to transfer petitioner to an appropriate facility prepared to accommodate his needs. See *ibid.*

It accordingly is far from obvious that petitioner's rights were violated in the first place. Nowhere does RLUIPA unequivocally declare that States violate the act before having any reasonable opportunity to correct or remove an incidental burden flowing from an

otherwise neutral and valid policy—even in circumstances where some delay is essentially *unavoidable*. On the contrary: 42 U.S.C. 2000cc-3(e) grants governments the right to "avoid the preemptive force of any [RLUIPA] provision * * * by changing the policy or practice" that results in the impermissible substantial burden. See also *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) ("we read [Section 2000cc-3(e)] to afford a government the discretion to take corrective action to eliminate a nondiscrimination provision violation"). So it is at least questionable whether a burden imposed for only a period of days—initiated as a result of prison security measures—violates RLUIPA and gives rise to damages notwithstanding the swift resolution of the problem once it was disclosed to the appropriate official. Because this predicate issue stands in the way of any damages award—and because the resolution of that question is not independently appropriate for review—the Court should deny *Cardinal* and await a superior vehicle with a clear and proven violation.[1]

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1. Nor does the petition arising from *Van Whye* v. *Reisch*, 581 F.3d 639 (8th Cir. 2009), petition for cert. pending, No. 09 821 (filed Jan. 8, 2010), represent an appropriate alternative vehicle for review. That case, like *Sossamon*, arises in an interlocutory posture; has no proven claims (much less any proven damages); and, most importantly, does not involve any proof of physical injury that could conceivably surpass the PLRA's categorical bar. See 581 F.3d at 647, 658.

B. The Federal Government's Lead Argument Under 42 U.S.C. 2000d-7 Is Unworthy Of Review

As its lead argument, the U.S. suggests that the damages question warrants review because the States have waived their sovereign immunity through 42 U.S.C. 2000d-7—rather than directly under RLUIPA itself. This splitless question was not raised or resolved below, and there is no reason to entertain it now.

1. The U.S. cites Section 2000d-7 as an additional reason to grant review, but its argument leads inexorably to the opposite conclusion. According to the U.S. (Br. 13), Section 2000d-7 presents a "sufficient" basis for sustaining petitioners' claims and thus renders consideration of the actual question presented academic. Yet the U.S. concedes (Br. 10-11) that petitioners failed to press this issue below, and acknowledges that neither circuit considered it. Petitioners thus failed to preserve the full range of issues necessary for a complete consideration of the underlying question. If Section 2000d-7 is a relevant, if not essential, component in deciding whether damages are available, these petitions are poor vehicles for adjudicating that claim.

The U.S. nevertheless contends (Br. 9 n.6) that the Court remains "free to consider" the applicability of Section 2000d-7. But the primary concern is not one of power, but *prudence*. The Court does not traditionally consider new arguments attacking an adverse judgment below, see *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), and these petitions

offer no reason for departing from that sound practice, see *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995).

In any event, contrary to the Federal Government's submission (at 9 n.6), it is not clear that the argument under Section 2000d-7 is authorized under this Court's "traditional rule." In *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 375, 379 (1995), unlike here, the previously unpressed claim had at least been *addressed* below. In addition, this is not a different argument for the same statute, but the invocation of *different* statutory authority for obtaining the same underlying result. That alone casts doubt on the propriety of granting review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

2. The Federal Government's lead argument is not the subject of any split. Only *two* appellate courts have even addressed the applicability of Section 2000d-7 in this setting—and both have held, emphatically, that its language is *not* sufficient to waive immunity. *Van Whye*, 581 F.3d at 654-666; *Madison* v. *Virginia*, 474 F.3d 118, 132-133 (4th Cir. 2000). Contrary to the U.S. suggestion, the Court should not grant review to become the third appellate court to consider a theory that has been rejected by both circuits confronting the issue. Further percolation is plainly appropriate.

3. Review is also unwarranted because the U.S. is wrong on the merits. The U.S. contends (Br. 10-13) that RLUIPA is covered by Section 2000d-7's catch-all provision—sweeping in statutes "prohibiting discrimination," 42 U.S.C. 2000d-7(a)(1)—but the U.S. is mistaken.

There is a clear distinction, as a matter of law and logic, between provisions requiring *accommodations* (such as RLUIPA) and those prohibiting *discrimination* (such as in Section 2000d-7). This Court has repeatedly reinforced that distinction in a variety of contexts. See, *e.g.*, *Employment Div.* v. *Smith*, 494 U.S. 872, 878-879, 886 & n.3, 890 (1990); *Washington* v. *Davis*, 426 U.S. 229, 238-242 (1976). And there is no doubt that the pertinent provisions of RLUIPA fall within the category of accommodations.

The statute's text, first and foremost, confirms this conclusion. The RLUIPA provisions at issue target government action that imposes certain "substantial burden[s]" on religious exercise—even when resulting from "a rule of general applicability." 42 U.S.C. 2000cc-1(a). In the land-use section of the act, by contrast, Congress specifically targeted "[d]iscrimination," including regulations "that discriminate[]" against religious organizations. 42 U.S.C. 2000cc(b)(2). Contrary to the Federal Government's contention (Br. 13 n.8), the "close proximity" of these contrasting provisions does not show that "Congress saw the two as of a piece." Congress did not use different language in adjacent sections of the same act because it intended for them to *mean the same thing*. On the contrary, this demonstrates that Congress understood how to invoke concepts of discrimination when it wished to do so. Its decision to speak in terms of accommodation for RLUIPA's prison component, while conspicuously omitting direct language about discrimination, should be presumed deliberate. *Van Whye*, 581 F.3d at 655.

This is also confirmed by RLUIPA's background and purpose. Were this part of RLUIPA an anti-discrimination statute, Congress would not have needed to invoke its Spending Clause authority—as Congress presumably could have simply invoked its powers under Section 5 of the Fourteenth Amendment. There is good reason, however, that the U.S. does not suggest that power was invoked here: the Equal Protection Clause does not prohibit these kinds of neutral policies, see *Smith*, 494 U.S. at 890, and Congress lacks the power to rewrite the Fourteenth Amendment's substantive prohibitions, see *City of Boerne* v. *Flores*, 521 U.S. 507, 519, 535 (1997).

In any event, the U.S. theory fails for another fundamental reason: Section 2000d-7's language, as applied to RLUIPA, is not so unmistakably clear that it compels the conclusion that immunity is waived. So even assuming a catch-all provision could ever "suffice as an 'unequivocal textual waiver,'" the language here surely does not. See *Madison*, 474 F.3d at 132-133.

C. The Damages Question Actually Presented Does Not Warrant Review

Given the lopsided nature of the split, its limited practical significance, and the serious chance that it might resolve itself, there is little reason for the Court to wade into the dispute at this time.

1. The U.S. is incorrect (Br. 21 & n.12) that there is "little reason" to expect the Eleventh Circuit to reconsider its decision. First, the four intervening circuits have not simply "adopt[ed] *Madison*'s reasoning as their own." *Ibid.* These circuits have

done what *Madison* did not do: each explained exactly why *Smith* erred in relying upon *Franklin* and *Barnes* in a context involving sovereign defendants. *E.g.*, Pet. App. 21a-24a. *Madison*, by contrast, invoked the correct line of cases (involving sovereign immunity), but neither mentioned nor discussed *Franklin* or *Barnes*. The Eleventh Circuit has never confronted the core consideration driving the decisions in every other circuit: cases against non-sovereign entities (*Franklin*) do not control in cases against sovereign defendants (*Lane* v. *Pena*, 518 U.S. 187 (1996)).

Second, the U.S. is incorrect, as a logical matter, when suggesting the Eleventh Circuit's position is entrenched because it denied rehearing *in 2008*—before four additional circuits *in 2009* held that *Smith* had erred. There is no indication the Eleventh Circuit will not reconsider its precedent once a proper (and post-hoc) occasion arises.

2. The existing conflict further lacks practical importance. As the U.S. recognized, the average RLUIPA claim does not involve physical injuries. U.S. Br. 22 (citing circumstances of "most cases"). Given that the PLRA forecloses damages—even in the Eleventh Circuit—for the claims most often arising, there is no urgency in resolving this shallow split.

3. As for the merits, few points require response beyond the brief in opposition.

First, the clear-statement rule in the spending context does apply alike to all entities. U.S. Br. 17. But language that clearly implies certain consequences for *non-sovereign* entities will not clearly imply the

same consequences for *sovereign* entities. This is the lesson of *Lane* and *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985). (*Lane* did not turn on the presence of a *federal* defendant, contra U.S. Br. 18-19, but rather on a *sovereign* defendant. See 518 U.S. at 195-197.) "A general authorization for suit in federal court" may suffice to put private defendants on notice of their obligations, but it "is not the kind of unequivocal statutory language" required in the Eleventh Amendment context. See *Atascadero*, 473 U.S. at 246.

Second, the U.S. errs in drawing a sharp contrast between immunity principles applicable to States and those applicable to the Federal Government. In each context, waivers of immunity must be unequivocally expressed. *E.g.*, *College Sav. Bank* v. *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 682 (1999).

Finally, the U.S. has it exactly backwards in suggesting that the identical phrase ("appropriate relief") in RFRA is insufficient to authorize damages against the U.S. while the same language in RLUIPA is sufficient to authorize damages against the States. The standard applicable when the Federal Government regulates its *own* conduct is not less stringent than the standard applicable when the Federal Government purports to regulate State entities. Only the latter threatens the delicate balance of our system of dual sovereignty. It would stand the law on its head to suggest that less is required when an *additional* constitutional dimension is at stake.

D. *Sossamon*'s Second Question Presented Does Not Warrant Review

The U.S. is correct that the individual-liability question does not implicate a circuit conflict and is unworthy of review. Br. 9-10. This Federal recommendation—regarding the interpretation of a federal statute—proves review is unwarranted.

A brief response on the merits:

Contrary to the Federal Government's position, *Sabri* v. *United States*, 541 U.S. 600 (2004), did not hold that Congress has the power to regulate third parties who do not receive federal funds and otherwise act beyond the scope of Congress's regulatory powers. This is why the Court did not address *Pennhurst*, the "contract" analogy in the spending context, or any of the constitutional concerns identified by all four circuits who have confronted the RLUIPA question.

On the contrary, *Sabri* rejected a *facial* challenge on the ground that a strict nexus was not required between the object of a bribe and the federal interest in the funds—a question that does not even ask whether the defendant was a funding recipient or a third party. See 541 U.S. at 604. *Sabri* also involved a defendant whose conduct involved direct attempts to bribe officials in order to obtain *federal* dollars—suggesting that, factually, *Sabri* is close to a situation, for example, in which a person attempts to steal federal funds in route to their end destination. The fact that Congress has the power to prevent the theft of federal dollars does not suggest that Congress has the power to regulate third parties, in their private conduct,

because their activity interferes with a spending *condition*, and not the actual spending (or federal dollars) itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
Assistant Solicitor General

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HARVEY LEROY SOSSAMON, III, PETITIONER

v.

STATE OF TEXAS, ET AL.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General
SARAH E. HARRINGTON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*

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INTEREST OF THE UNITED STATES

This case presents the question whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* The United States has a significant interest in the resolution of that question. The Attorney General may bring actions under RLUIPA for injunctive or declaratory relief, 42 U.S.C. 2000cc-2(f), but full enforcement of RLUIPA's requirements depends on an effective private judicial remedy. If damages are unavailable in actions against States and their officials, RLUIPA's enforcement will be significantly undermined. At the Court's invitation, the United States filed a brief at the petition stage in this case.

STATEMENT

1. Congress enacted RLUIPA to provide statutory protection against religious discrimination --including unequal treatment of religions in the provision of accommodations and unjustified infringement of the free exercise of religion—by state and local governmental entities. The statute applies to two specific contexts: land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress defined the statutory term "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years. It gathered substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*,

146 Cong. Rec. 16,698-16,699 (2000). Such unjustified burdens on religious exercise particularly affect persons confined to correctional facilities. See *id* at 16,701. Congress learned about instances of prison officials' interfering with religious rituals without apparent justification, thereby restricting prisoners' religious exercise "in egregious and unnecessary ways." *Id.* at 16,699.

Congress also heard testimony about sectarian discrimination in the provision of accommodations to prisoners. For example, one prison permitted the lighting of votive candles but not Chanukah candles. See *Protecting Religious Freedom After* Boerne v. Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. 3, at 41 (1998) (*House Hearing*) (statement of Isaac Jaroslawicz). Another prison provided kosher food to Jewish prisoners, but not Halal food to Muslim prisoners, although it could have acquired both types of meals from the same vendor. *Id.* at 11 n.1 (statement of Marc D. Stern). And Congress learned of one case in which a prison treated the religious exercise of Catholics more favorably than that of Protestants by permitting prisoners to wear crosses only when they were part of rosaries. 146 Cong. Rec. at 16,699 (discussing *Sasnett* v. *Litscher*, 197 F.3d 290, 292-293 (7th Cir. 1999)).

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending

Clause authority, U.S. Const. Art. I, § 8, Cl. 1, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[1] A covered "program or activity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a(1)(A). Congress modeled this provision on similar provisions in other civil rights laws that likewise rely upon Spending Clause authority, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Congress also provided an express private right of action to enforce RLUIPA's protections and to obtain "appropriate relief" for violations of RLUIPA. 42 U.S.C. 2000cc-2(a).

2. At the time he filed his complaint, petitioner was a state inmate housed in the Robertson Unit of the Texas Department of Criminal Justice-Correctional Institutions Division facility (Robertson). Pet. App. 2a. Petitioner, a Christian, alleges that he was denied the use of the prison chapel for purposes of worship (which has been referred to as his "chapel use" claim) and was denied access to all worship services while he was on cell restriction (his "cell restriction" claim). *Id.* at 2a-4a. He further alleges that inmates who practiced other faiths were provided special accommodations that were not

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[1] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b).

provided to Christians, *id.* at 3a, and that inmates who were on cell restriction were permitted to attend secular activities such as work and the law library, but were not permitted to attend religious services, *ibid.*

Petitioner filed suit pro se against the State of Texas and various prison officials alleging violations of: RLUIPA's institutionalized persons provisions; 42 U.S.C. 1983 for violations of his rights under the First, Eighth, and Fourteenth Amendments; and state law provisions protecting religious liberties. Pet. App. 4a-5a. He sought declaratory and injunctive relief against respondents in their official capacities, and compensatory and punitive damages from them in their official and individual capacities. *Id.* at 5a. On the chapel-use claim, respondents conceded that petitioner and other prisoners were denied access to the chapel at the Robertson facility for the entirety of his period of incarceration. *Id.* at 6a. Respondents further noted that, starting at some point after petitioner filed a grievance on this issue, no religious worship at all is permitted at the chapel. *Ibid.* On the cell-restriction claim, respondents noted that the Robertson facility changed its policy to permit certain prisoners (including petitioner) to attend religious services while on cell restriction, and the State later adopted that policy for all of its correctional facilities. *Id.* at 5a.

The district court granted summary judgment to respondents. Pet. App. 8a. The court held that: (1) the Eleventh Amendment barred petitioner's claims for monetary relief against the State and state officials in their official capacities, *id.* at 42a-43a; (2) respondents were entitled to qualified immunity from suit for damages in their individual capacities, *id.* at 43a-45a; and

(3) injunctive relief was not appropriate under the circumstances, see *id.* at 8a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-35a. The court first dismissed as moot petitioner's claims seeking declaratory and injunctive relief based on respondents' former cell-restriction policy. *Id.* at 9a-13a.

Turning to petitioner's RLUIPA claims against respondents in their individual capacities, the court of appeals found no basis in the statute for such relief, holding that, because RLUIPA was passed pursuant to Congress's authority under the Spending Clause, only entities that were "parties to the contract" (*i.e.*, the grant of federal funds in exchange for agreement to certain conditions) could be held liable for violation of the statute. Pet. App. 14a-20a. Individual RLUIPA defendants, the court explained, were not parties to the contract, and thus are not subject to suit in their individual capacities. *Id.* at 17a 19a.[2]

The court of appeals then assumed that RLUIPA creates a damages cause of action against officials in their official capacities, but held that Texas's sovereign immunity bars such an action. Pet. App. 20a-24a. Acknowledging a division among the courts of appeals on that issue, *id.* at 21a, the court concluded that RLUIPA's language is "clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state

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[2] This Court granted the petition for a writ of certiorari in this case limited to the question: "Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act." Thus, the question whether an individual may sue a state official in his personal capacity for violations of RLUIPA is not before the Court.

sovereign immunity from suits for monetary relief," *id.* at 23a. Accordingly, the court held that the Eleventh Amendment bars claims for monetary relief against Texas and its officers in their official capacities. *Id.* at 23a-24a.

Finally, the court of appeals allowed petitioner's chapel-use claims for declaratory and injunctive relief against respondents in their official capacities to proceed, Pet. App. 24a-32a, finding that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief," *id.* at 14a.

SUMMARY OF ARGUMENT

When Congress grants federal funds to States or other entities, it may exercise its authority under the Spending Clause to attach conditions to the receipt of those funds so long as it is unambiguously clear what those conditions are. It is undisputed in this case that, when Congress enacted RLUIPA, it unambiguously conditioned the receipt of federal funds on a State's agreeing not to impose substantial burdens on the free exercise of institutionalized persons unless doing so is the least restrictive means of furthering a compelling government interest. Congress also conditioned the receipt of federal funds on a State's waiver of its Eleventh Amendment immunity—to claims for money damages and for injunctive relief—to suits to enforce RLUIPA's substantive requirements.

Respondents contend that they are not subject to private suits for money damages because RLUIPA's authorization of "appropriate relief" is not sufficiently clear to put them on notice that they will be subject to such relief for violations of the statute. Respondents do not appear to contest that they had sufficient notice that

they would be subject to private suits in federal court for injunctive relief. Critically, respondents also do not appear to contest that RLUIPA speaks in sufficiently clear terms to notify non-State recipients of federal funds that they will be subject to private suits for money damages for violations of the statute. This Court has repeatedly held that, when Congress conditions the receipt of federal funds on a recipient's agreeing to abide by certain substantive provisions, individuals are entitled to monetary damages to compensate them for a recipient's violation of the conditions to which it agreed when it accepted the funds. The Court has explained that, because Spending Clause legislation is much in the nature of a contract, contract law governs the scope of available remedies when a recipient violates the terms of the contract. And this Court has repeatedly held that that scope includes all "appropriate relief," including monetary damages. Even if Congress had failed to mention anything about the scope of relief in RLUIPA, this Court's precedents would dictate that monetary damages are available. And here, where Congress has decided to provide an additional layer of clarity by incorporating the very phrase this Court has used to describe a range of relief that includes compensatory damages, the explicit condition on the funds is manifest.

The thrust of respondents' argument is that Congress must use different words to notify State recipients of the consequences of their accepting federal funds than it must to notify non-State government entities of the same consequences. That contention finds no support in either the Spending Clause or the Eleventh Amendment. Nor can it be derived from the law governing the United States' waiver of its own immunity. When the federal government waives its immunity in a

statute, it does so unilaterally and as a gratuity, and courts have held that such a waiver must be narrowly construed and must specify the types of relief to which immunity has been waived. But even if the same rules applied to States—and they do not—this case does not implicate a State's similarly gratuitous waiver of its immunity. Rather, the waiver of immunity at issue in this case is the State's contractual agreement to abide by the terms of RLUIPA and to answer in federal court for its failure to do so in return for accepting federal funds. The scope of relief available in such a situation is determined by background principles of contract law. The same is true with respect to the United States, which has waived its sovereign immunity to suits for breach of contract in the Tucker Act, 28 U.S.C. 1491(a)(1); the scope of relief available in breach-of-contract suits against the United States is governed by background contract principles, which authorize the award of money damages.

Even if RLUIPA itself did not provide sufficient notice to State recipients of federal funds that they would be subject to suit for money damages, Congress provided additional notice of that fact when it enacted 42 U.S.C. 2000d-7. Section 2000d-7 provides that State recipients of federal funds waive their Eleventh Amendment immunity to—and shall be liable for the same damages as other parties in—suits alleging violations of Spending Clause statutes prohibiting discrimination. RLUIPA is a federal statute prohibiting discrimination in programs that accept federal funds. This Court has repeatedly held that, when Congress uses the word "discrimination," courts should interpret that term broadly. As is clear from Section 2000d-7's reference to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794,

"discrimination" as used in that provision includes a prohibition on a fund recipient's imposition of unjustified burdens. RLUIPA's requirement that State prisons not impose unjustified burdens on inmates' religious exercise also prohibits discrimination by barring prisons from imposing unequal burdens on one type of religious exercise as compared to another, and from preferring secular activity over a similar type of religious activity. RLUIPA follows in a long tradition of preventing discrimination by guarding against unfair bias, and therefore falls comfortably within the scope of Section 2000d-7.

ARGUMENT

A STATE WAIVES ITS ELEVENTH AMENDMENT IMMUNITY TO SUITS FOR MONEY DAMAGES UNDER RLUIPA WHEN IT ACCEPTS FEDERAL FUNDS

This Court has made clear that Congress, in the exercise of its power under the Spending Clause, may condition the receipt of federal funds on a State's waiver of Eleventh Amendment immunity to suit—including suits seeking money damages. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Lane* v. *Pena*, 518 U.S. 187, 198-200 (1996). When Congress intends to attach such a condition to the receipt of federal funds, it must do so clearly and unambiguously. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985) (*Atascadero*); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Congress has done precisely that in two separate statutory provisions, thereby putting States on notice that, if they accept federal funds for their correctional systems, they will be subject to private suits in federal court to enforce RLUIPA's protection of inmates' religious liberties, in-

cluding suits for money damages. By accepting such funds, a State knowingly waives its Eleventh Amendment immunity to RLUIPA claims brought by state inmates.

A. RLUIPA Puts Recipients Of Federal Funds On Notice That They Are Subject To Suit In Federal Court For Appropriate Relief, Including Money Damages

As this Court held in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst*), "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." By speaking clearly, Congress gives fund recipients "the choice of complying with the conditions set forth * * * or foregoing the benefits of federal funding." *Id.* at 11. It is common ground in this case that, in enacting RLUIPA, Congress put recipients of federal funds on notice of at least three things. First, Congress clearly stated that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * * in any case in which * * * the substantial burden is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1. Second, Congress created an express cause of action for individuals against "a government," including "a State," thereby putting fund recipients on notice that they would be subject to private suits in federal courts for violations of RLUIPA. 42 U.S.C. 2000cc-2(a) ("A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."); 42 U.S.C. 2000cc-5(4)(A)(i) (defining "government" to include "a State"). And third, Congress put fund recipients on notice that they would be liable for "appropriate

relief" in such actions. 42 U.S.C. 2000cc-2(a). The central question in this case is whether Congress also put fund recipients on notice that the authorization of "appropriate relief" for violations of the statute encompasses an authorization for courts to award money damages. Under this Court's many cases interpreting Congress's authority to place conditions on the grant of federal funds, it is clear that Congress did.

1. This Court has frequently considered the scope of relief available to private individuals in suits brought to enforce civil rights laws enacted pursuant to the Spending Clause, specifically Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794. The Court has held that each of those statutes may be enforced by individuals through a private right of action, see *Barnes* v. *Gorman*, 536 U.S. 181, 185-186 (2002); but because that right of action is implied, none of those statutes contains any provision specifying what remedies are available. In the absence of such specification by Congress, this Court has held that those statutes permit individual litigants to seek "appropriate relief," and that "appropriate relief" includes "compensatory damages." See *id.* at 187-189; *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 68-71 (1992).

In *Franklin*, the Court confronted the question whether money damages are available in private suits under Title IX. In answering that question affirmatively, the Court explained that, when a statute creates a legal right and permits an individual to sue for invasion of that right, the Court "presume[s] the availability of *all appropriate remedies* unless Congress has ex-

pressly indicated otherwise." 503 U.S. at 66 (emphasis added); see *id.* at 68; *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). Specifically rejecting the argument that remedies under Title IX should be limited to injunctions and other equitable relief, the Court further noted that "it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Franklin*, 503 U.S. at 75-76. Finding no "legislative intent to abandon the traditional presumption in favor of all available remedies," *id.* at 72, the Court held that "a damages remedy is available for an action to enforce Title IX," *id.* at 76.

In so holding, the Court considered and rejected the view "that the normal presumption in favor of all appropriate remedies should not apply" to statutes "enacted pursuant to Congress' Spending Clause power." *Franklin*, 503 U.S. at 74. Instead, the Court held that the availability of money damages for intentional violations of Spending Clause legislation is presumed so long as Congress clearly alerts fund recipients about the substantive requirements of the statute. *Id.* at 74-75. The Court reaffirmed that principle in subsequent cases such as *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), and *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), holding again that individuals may enforce Spending Clause statutes such as Title IX through "private damages actions * * * where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Davis*, 526 U.S. at 640; see *Gebser*, 524 U.S. at 287. Clear notice of the substantive conditions attached to the receipt of federal funds is necessary, the Court noted, because of "Title IX's contractual nature." *Ibid.*; see *Franklin*, 503 U.S. at 74. As the Court explained in *Da-*

vis, "[w]hen Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" 526 U.S. at 640 (quoting *Pennhurst*, 451 U.S. at 17).

In *Barnes* v. *Gorman*, 536 U.S. 181 (2002), the Court again considered the range of remedies available to private parties for violations of conditions contained in Spending Clause statutes. *Id.* at 185 (noting that the Court was addressing "the scope of 'appropriate relief'" available under Spending Clause statutes). In determining that punitive damages are not available for such violations, the Court continued its settled practice of applying a "contract-law analogy" to determine "the *scope* of damages remedies" available. *Id.* at 187; accord, *Gebser*, 524 U.S. at 287. The Court thus reasoned that a remedy for a violation of Spending Clause legislation "is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes*, 536 U.S. at 187 (quoting *Franklin*, 503 U.S. at 73) (internal citation omitted). And, the Court held, "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Ibid.* Such remedies include compensatory money damages and injunctive relief, which the Court described as "forms of relief traditionally available in suits for breach of contract," but not punitive damages, which the Court noted "are generally not available for breach of contract." *Ibid.*

2. Congress enacted RLUIPA in 2000 against the backdrop of this Court's decisions in cases such as *Franklin*, *Gebser*, and *Davis*. Those cases made clear

that, "unless Congress has *expressly indicated otherwise*," *Franklin*, 503 U.S. at 66 (emphasis added), courts should presume that recipients of federal funds are subject to "appropriate relief," including money damages, for intentional violations of Spending Clause conditions. If Congress had imposed RLUIPA's substantive conditions on recipients of federal funds without specifying the scope of relief available to private plaintiffs for violations of those conditions, this Court's holdings in the *Franklin* line of cases would fill the gap by specifying that compensatory damages are available. Cf. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297-298 (2006) (holding that spending clause statute authorizing the award of "costs" to prevailing plaintiffs is not sufficiently clear to authorize the award of expert fees because "'costs' is a term of art that generally does *not* include expert fees" (emphasis added)). Congress decided to include an additional layer of clarity, specifically noting the availability of "appropriate relief." By including this well-worn phrase in RLUIPA, Congress made it unambiguously clear to recipients of federal aid, including States, that RLUIPA authorizes actions for compensatory damages against those whose intentional actions violate RLUIPA's requirements. The court of appeals could find the term "appropriate relief" ambiguous only by considering it divorced from the jurisprudence that RLUIPA incorporates.

As the Court did in *Franklin*, a court should inquire whether Congress expressly indicated in RLUIPA that it intended to depart from the general rule that money damages are available for intentional violations of Spending Clause conditions. There is no such indication in RLUIPA. On the contrary, the text and purpose of the statute indicate that Congress intended that com-

pensatory damages be available to institutionalized persons whose free exercise of religion has been substantially burdened in violation of the statute. For example, Congress's intention to provide private claimants with the ability to seek money damages is apparent from the statute's express limitation on remedies the Attorney General may seek in enforcing RLUIPA. That limitation of remedy to "injunctive or declaratory relief," 42 U.S.C. 2000cc-2(f), would be superfluous if private plaintiffs were not entitled to seek other remedies.[3]

In addition, the general rule in enforcing federal rights is that, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell*, 327 U.S. at 684; see *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964). In RLUIPA suits brought by institutionalized persons, prospective relief is often insufficient to "make good the wrong done" by the institution's imposition of a substantial burden on the individual's religious exercise. In many such cases, claims for injunctive relief become moot long before the legitimacy of the state actions that precipitated them can be adjudicated because, *e.g.*, the institution releases the individual or transfers him to

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[3] Moreover, even if Congress had also specified that private plaintiffs were entitled to "injunctive or declaratory relief," this Court's holding in *Barnes* dictates that inmates would also be entitled to compensatory damages. *Barnes*, 536 U.S. at 187 (noting that a recipient of federal funds is "generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including compensatory damages).

another prison or to another area within the prison.[4] Or—as happened in this case—a prison may change its challenged practice in response to a RLUIPA suit. Although such voluntary compliance with RLUIPA's mandate is desirable, it does not compensate the individual whose rights may have been violated and therefore is not an adequate remedy for that individual. As this Court explained in *Barnes*, "[w]hen a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure." 536 U.S. at 189 (citing *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 633 (1983)).[5]

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[4] See, *e.g.*, *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 835 (8th Cir. 2009); *Ivory* v. *Tilton*, No. 09-cv-1272, 2010 WL 144356, at *8 (E.D. Cal. Jan. 8, 2010); *Rust* v. *Nebraska Dep't of Corr. Servs. Religion Study Comm.*, No. 08-cv-3185, 2009 WL 3836544, at *10-*11 (D. Neb. Nov. 12, 2009).

[5] Particularly likely to evade review are those RLUIPA violations that arise out of animus-based incidents or short-term treatment of prisoners. These sorts of claims can involve some of the most egregious violations of prisoners' RLUIPA rights, but they cannot be remedied by prospective relief. Absent the availability of a damages remedy, a prisoner may have no standing to challenge a practice that harmed him in the past but is not currently harming him or likely to do so again. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 106-111 (1983). For example, prospective relief cannot make whole a prison's failure to provide kosher food for eight days upon a prisoner's arrival, effectively starving the prisoner during that time. See *Cardinal* v. *Metrish*, 564 F.3d 794, 797-799 (6th Cir. 2009), petition for cert. pending, No. 09-109 (filed July 22, 2009). Congress specifically heard testimony about the problem of prisons' interference with religiously-motivated dietary restrictions in the hearings leading to the enactment of RLUIPA. See

Nor was Congress careless about subjecting state prison systems to excessive monetary liability. RLUIPA explicitly declares that it shall not "be construed to repeal the Prison Litigation Reform Act of 1995" (PLRA), 42 U.S.C. 1997e. See 42 U.S.C. 2000cc-2(e). Among other things, the PLRA bars prisoners from bringing suit "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. 1997e(e). Unless an inmate can establish that he was physically harmed, therefore, States will often be subject only to nominal damages under RLUIPA's institutionalized persons provisions. See *Smith* v. *Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

B. Nothing In The Constitution Requires Congress To Speak More Clearly When Attaching Conditions To Funds Received By States Than When Attaching Conditions To Funds Received By Local Governments

1. Respondents have argued (Br. in Opp. 13-14) that the rules articulated in cases such as *Franklin* and *Barnes* do not apply here because those cases involved defendants who were not entitled to Eleventh Amendment immunity. But the requirement that conditions attached to federal funds be unambiguously expressed does not vary according to the type of entity accepting the conditioned funds. That notice requirement, which formed the basis of the decisions in cases such as *Franklin* and *Barnes*, applies regardless of whether Congress offers financial assistance to States, to local governments, or to private entities. *E.g.*, *Gebser*, 524 U.S. at 287 (noting necessity of "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable

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House Hearing 11 n.1 (Statement of Marc D. Stern); *id.* at 43 (Statement of Isaac Jaroslawicz).

for a monetary award'") (brackets in original) (quoting *Franklin*, 503 U.S. at 74). If other entities have sufficient notice of the availability of money damages in suits to enforce funding conditions, so too do States.

To be sure, States and state agencies receiving federal funds start out with Eleventh Amendment immunity—to suits for injunctive relief as well as damages—while other entities do not. But that difference is relevant only to the calculus the State must make in deciding whether to accept clearly conditioned funds. As this Court explained in *Barnes*: "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'" 536 U.S. at 186 (quoting *Pennhurst*, 451 U.S. at 17) (brackets in original). Congress made it clear in the text of RLUIPA that States that accept federal funds for their prison systems would have to comply with RLUIPA's accommodation mandate and would be subject to federal suits by private individuals. Indeed, respondent State of Texas apparently does not contest that it is subject to private suits in federal court for injunctive relief claims. Texas therefore does not contest that it knowingly waived its Eleventh Amendment immunity to such claims when it accepted federal funds.

As explained *supra*, Congress made it equally clear that the acceptance of federal funds would also subject recipients—including State recipients—to private suits for money damages. RLUIPA was the contractual offer, the Texas Department of Criminal Justice's voluntary receipt of federal financial assistance was the acceptance of the terms of the offer, and Texas cannot now evade traditional remedies for its alleged breach of that con-

tract. There is nothing in the Eleventh Amendment that renders a State any less able than another party to understand the clear conditions imposed through a federal spending statute.

2. Although respondents admit (Resp. Supp. Br. 10) in one breath that "the clear-statement rule in the spending context does apply alike to all entities," they suggest in the next that a statement that is clear enough to inform a local government that it will be subject to damages suits may not be clear enough to inform a State government of the same thing. That amounts to an argument that Congress must choose among a particular set of (unidentified) words when it wishes to express its intent to subject States to money damages for violating conditions on the receipt of federal funds. But this Court has never held that Congress must use specific words like "Eleventh Amendment" or "sovereign immunity," when it intends to indicate that States will be subject to private suits in federal court. Cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000) (holding that Congress clearly expressed its intent to abrogate States' immunity to suits under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, without using such phrases). Nor has the Court held that Congress must use magic words like "money damages" or "compensatory damages" to specify that such damages may be awarded for violations of spending conditions. Indeed, the Court in the *Franklin* line of cases repeatedly relied on the clear-statement rule as articulated in *Pennhurst*—a case against a State defendant—in finding that Title IX, Title VI, and Section 504 provided sufficiently clear notice to fund recipients that they would be subject to the remedy of money damages for violations of the protections provided in those stat-

utes. There is no indication in any of those cases that the Court was applying a relaxed version of *Pennhurst*'s notice rule because the recipient-defendants in those cases were not State entities.

Some courts of appeals (including the court in this case) have held that a different clear-statement rule applies in determining the scope of remedies available in suits against States than in suits against other parties. In so holding, those courts—like respondents (Br. in Opp. 12-14)—ventured outside the Spending Clause context and relied instead on this Court's cases involving the federal government's waiver of *its own* sovereign immunity. *E.g.*, Pet. App. 22a & n.46; *Cardinal* v. *Metrish*, 564 F.3d 794, 799-801 (6th Cir. 2009), petition for cert. pending, No. 09-109 (filed July 22, 2009); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 653 (8th Cir. 2009), petition for cert. pending, No. 09-821 (filed Jan. 8, 2010); *Madison* v. *Virginia*, 474 F.3d 118, 131-132 (4th Cir. 2006). In *Lane* v. *Pena*, *supra*, for example, the Court concluded that the holding in *Franklin* that the "implied private right of action under Title IX * * * supports a claim for monetary damages" does not apply to suits against the federal government. Instead, when Congress statutorily subjects the federal government to suit, "the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." 518 U.S. at 196-197.

But the federal government's voluntary waiver of its sovereign immunity is not at all equivalent to a State's waiver of Eleventh Amendment immunity in exchange for clearly conditioned federal funds. In the former case, the enactment of federal legislation itself constitutes the waiver, and the Court requires Congress to speak clearly in that legislation about both the Govern-

ment's amenability to suit and the relief available in such a suit. But when Congress conditions the receipt of federal funds on a State's waiver of immunity, the waiver comes not from the terms of the legislation, but from the State's acceptance of funds with knowledge of the consequences, as informed by the text of the statute and governing background legal principles. Here, a State has such knowledge because this Court has made clear that, when Congress attaches substantive conditions to the receipt of federal funds and (explicitly or implicitly) authorizes private parties to sue for violation of those conditions, those parties may seek money damages. Thus, when a State accepts federal funds for its correctional system, it does so cognizant of the following consequences: that it must comply with the substantive requirements of RLUIPA; that state inmates may sue States for breach of those requirements; and that, if such an inmate prevails on the merits, the State will be liable for compensatory damages (unless otherwise prohibited, see p. 18, *supra*). None of this should come as a surprise to States—just as it does not come as a surprise to non-State governmental entities.

In any case, because of the contract nature of spending clause legislation, the appropriate analogy in determining the *scope* of relief available against a sovereign under RLUIPA is the scope of relief available against the United States in suits for breach of contract. Although the United States is entitled as a constitutional matter to assert sovereign immunity to claims for breach of contract, Congress waived the federal government's immunity to damages claims arising out of breach of contract (as well as certain other enumerated sources of law) in the Tucker Act, 28 U.S.C. 1491(a)(1), and related statutes. The Tucker Act provides the

United States Court of Federal Claims with "jurisdiction to render judgment upon any claim against the United States founded * * * upon any express or implied contract with the United States." *Ibid.* It is well settled that, although the Tucker Act constitutes a waiver of the federal government's sovereign immunity to certain types of damages claims, it does not itself create any enforceable right to such claims. See *United States* v. *Mitchell*, 463 U.S. 206, 216-219 (1983). Rather, some other source of law must give rise to a right to compensation from the federal government—and if it does, the Tucker Act permits enforcement of that right in the Court of Federal Claims. This Court has held that the question whether damages are available for breach-of-contract claims against the federal government under the Tucker Act is governed by the background federal common law of contracts. See *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); see also *United States* v. *Winstar Corp.*, 518 U.S. 839, 870-871, 895 (1996); Gregory C. Sisk, *Litigation with the Federal Government* § 4.08(e), at 320 (4th ed. 2006). And that background law provides that money damages are the default remedy for breach-of-contract claims regardless of whether the contract itself specifies that such damages are available.[6] See *Winstar*, 518 U.S. at 885-886 & n.30 (relying on Restatement (Second) of Contracts

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[6] Of course, even against the backdrop of existing contract law, private parties could not sue the United States for breach of contract unless the United States waived its immunity to suit, see *Lynch*, 292 U.S. at 580-582, as it has in the Tucker Act. By accepting federal funds conditioned on private parties' being able to sue fund recipients (including States) to enforce RLUIPA, 42 U.S.C. 2000cc-2(a), respondent Texas similarly waived its immunity.

§ 346, Comment *a* (1981)); see also *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460,462-465 (1980).[7]

In other words, the federal government is liable for damages when it breaches contract terms because it agreed to be subject to suit for contract claims and the background federal common law of contracts provides that damages are available for breach. Similarly, a State is liable for damages when it breaches the terms of RLUIPA's spending clause contract because it agreed to be subject to private suit in federal court to enforce those terms and the background principles of contract law provide that damages are available for breach of those terms. See *Barnes*, 536 U.S. at 187. Thus, even if courts were required to construe the scope of relief available against a State that waives its immunity as narrowly as they construe the scope of relief available against the United States when it waives its immunity —which they are not—respondents would still be liable for money damages for violations of RLUIPA.

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[7] In *Webman* v. *Federal Bureau of Prisons*, 441 F.3d 1022 (2006), for example, the District of Columbia Circuit correctly held that the term "appropriate relief" as used in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*—which applies only to the federal government—is insufficient to waive the federal government's sovereign immunity from suits for monetary damages. Although RFRA creates enforceable statutory rights, it is not contractual in nature and is therefore not governed by the background principles that govern the federal government's contractual relationships or the interpretation of Spending Clause legislation.

C. Even If Congress Were Required To Use Particular Words, It Did So When It Enacted 42 U.S.C. 2000d-7, Which Conditions The Receipt Of Federal Funds On A State's Waiver Of Its Eleventh Amendment Immunity To Suits For Violations Of Antidiscrimination Spending Clause Legislation

1. Even if Congress were required to use particular words to signal that a State waives its Eleventh Amendment immunity to suits for money damages for violations of RLUIPA, Congress did so not only with the phrase "appropriate relief" but also in completely separate legislation. In 1986, Congress enacted 42 U.S.C. 2000d-7, a statutory provision titled "Civil rights remedies equalization." Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (42 U.S.C. 2000d-7). That provision provides in pertinent part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies

> are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a) (brackets in original) (emphasis added).

Section 2000d-7 was enacted in response to this Court's decision in *Atascadero*, 473 U.S. at 246, which held that Congress had not used sufficiently clear statutory language in Section 504 of the Rehabilitation Act to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to claims brought under that section. The Court reaffirmed in *Atascadero* that "mere receipt of federal funds" by a State is insufficient to constitute a waiver of immunity, while confirming that, if a statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the acceptance of funds constitutes a waiver. *Id.* at 246-247; *College Sav. Bank*, 527 U.S. at 686.

Section 2000d-7 provides the requisite unequivocal notice to "enable the States to exercise their choice [to accept federal funds] knowingly, cognizant of the consequences of their participation" in a federal spending program. *Pennhurst*, 451 U.S. at 17. That statutory provision makes clear both that a State or state agency that accepts federal funds will be subject to private suits in federal court to enforce "any * * * Federal statute prohibiting discrimination by recipients of Federal financial assistance" and that it will be subject to the same remedies (including money damages) that are available against non-State entities. 42 U.S.C. 2000d-7(a). In his concurring opinion in *Franklin*, Justice Scalia noted that he would have held that money damages are available for violations of Title IX by funding recipients

because Congress "implicit[ly] acknowledg[ed]" as much in enacting Section 2000d-7. 503 U.S. at 78. Notably, Justice Scalia also remarked that Section 2000d-7 "withdraw[s] the States' Eleventh Amendment immunity" and provides that the same remedies that are available against non-State entities—which Justice Scalia agreed includes money damages—are available against State recipients of federal funds. *Ibid.*

2. Because RLUIPA is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," Section 2000d-7 puts States on notice that, by accepting federal funds, they waive their Eleventh Amendment immunity to RLUIPA claims—and that they will be subject to the same damages remedy that is available against non-State recipients.[8] Respondents

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[8] It appears that the court of appeals did not consider whether Section 2000d-7 applies to RLUIPA claims. As explained in the United States' amicus brief filed in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), this Court is nevertheless free to consider whether Section 2000d-7's requirement that federal fund recipients waive their Eleventh Amendment immunity applies to RLUIPA claims under the Court's "traditional rule" that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (brackets in original). The argument that a State waives its immunity pursuant to Section 2000d-7 is "not a new claim within the meaning of that rule, but a new argument to support what has been [petitioner's] consistent claim:" that he is entitled to sue respondents for money damages under RLUIPA. *Ibid.* Respondents rely (Resp. Supp. Br. 6-7) on this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), in which the Court declined to consider an argument that had not been raised below because the court of appeals had not addressed the issue. Here, however, the court of appeals relied in large part on the Fourth Circuit's decision in *Madison*, which did consider and reject

have argued (Br. in Opp. 6-8; Resp. Supp. Br. 7-9), and several courts of appeals have held, that Section 2000d-7's catch-all provision does not waive immunity from a suit like petitioner's because the relevant statutory protection in RLUIPA does not use the word "discrimination." *Madison*, 474 F.3d at 132-133; *Van Wyhe*, 581 F.3d at 654-655. Respondents also assert (Resp. Supp. Br. 8-9) that "[t]here is a clear distinction, as a matter of law and logic, between provisions requiring *accommodations* (such as RLUIPA) and those prohibiting *discrimination* (such as in Section 2000d-7)." That argument both misconstrues the statute's prohibition on the imposition of substantial burdens and inappropriately narrows the meaning of the word "discrimination" as used in Section 2000d-7.

a. RLUIPA's prohibition on the imposition of "a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. 2000cc-1(a), prohibits discrimination by requiring funding recipients to justify the imposition of such burdens. In construing the protections of the Free Exercise Clause, this Court has held that it "[a]t a minimum" prohibits government rules that "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (*Lukumi*). Although the protection afforded in this provision of RLUIPA is

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this argument. See Pet. App. 22a-23a; *Madison*, 474 F.3d at 132-133. And, unlike the arguments that were not addressed by the court of appeals in *United Foods*, the argument that Section 2000d-7 clearly conditions respondents' receipt of federal funds on a waiver of immunity to damages claims under RLUIPA does not depend on the development of any particular facts. See 533 U.S. at 416-417.

certainly intended to be broader than that afforded by the Free Exercise Clause (insofar as it prohibits some substantial burdens resulting from generally applicable rules that would be permissible under the First Amendment), it also encompasses the protection afforded in the Free Exercise Clause itself. And that protection includes a prohibition on a government's imposition of a substantial burden on religious exercise in a manner that is not neutral—*i.e.*, in a manner that discriminates. *Id.* at 534 ("The Free Exercise Clause * * * extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality.'") (quoting *Gillette* v. *United States*, 401 U.S. 437, 452 (1971)).

When Congress enacted RLUIPA, it understood that prisoners often face disparate treatment based on their *particular* religions—for example, when prisons make accommodations for adherents of some faiths but not for adherents of others, or when prisons permit certain types of activities for secular purposes but not for religious purposes. See p. 3, *supra*; see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 713 (2005) (inmates who are members of "nonmainstream" religions contended that they were denied "the same opportunities for group worship that are granted to adherents of mainstream religions"); *id.* at 716 n.5 (a "typical example" of problems Congress meant to remedy with RLUIPA was a prison that "refused to provide Moslems with Hallal food, even though it provided Kosher food"). RLUIPA remedies this widespread problem of selective imposition of burdens on religious exercise by ensuring that all faiths will receive accommodations on equal terms. And RLUIPA ensures that prisons do not discriminate against religious observance in general by permitting activities undertaken for secular purposes and prohibiting the same

activities undertaken for religious purposes. For example, in this case petitioner alleges that respondents discriminated against his religious exercise by refusing (without good reason) to allow him to attend worship services while on cell restriction while permitting other inmates on cell restriction to attend secular activities. Accordingly, even if respondents were correct that Section 2000d-7 applies only to spending clause statutes that prohibit intentionally disparate treatment, RLUIPA is such a statute.

b. In any case, respondents are not correct that Congress's use of the word "discrimination" in Section 2000d-7 is so limited. This Court has held that the word "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment," and that, when Congress "us[es] such a broad term, Congress g[i]ve[s] [a] statute a broad reach." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). So too in Section 2000d-7: when Congress clearly conditioned federal funds on a State's waiver of Eleventh Amendment immunity to claims under "any" federal statute "prohibiting discrimination by recipients of Federal financial assistance," 42 U.S.C. 2000d-7(a), it included statutes prohibiting a broad range of discriminatory conduct.

That broad range of conduct may include a failure to make reasonable accommodations as prescribed by law. Section 504 of the Rehabilitation Act—the very statute at issue in *Atascadero* and listed first in Section 2000d-7—demonstrates how a prohibition on "discrimination" may include a requirement that accommodations be made to generally applicable rules as RLUIPA requires. For decades, regulations have interpreted Section 504's ban on disability-based discrimination to require that covered entities make "reasonable accom-

modation[s]" for qualified persons with disabilities. See, *e.g.*, 28 C.F.R. 41.53. In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), this Court considered the scope of the identical antidiscrimination mandate in Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* The Court held that the ADA's prohibition on subjecting persons with disabilities to "discrimination" by public entities includes a prohibition on unjustified isolation of such persons. *Olmstead*, 527 U.S. at 597-602. In so holding, the Court specifically rejected the argument that the ADA's prohibition on "discrimination" was limited to a prohibition on "uneven treatment of similarly situated individuals." *Id.* at 598. Instead, the Court held, "Congress had a more comprehensive view of the concept of discrimination," *ibid.*—a view that "properly regarded" unjustified isolation "as discrimination based on disability," *id.* at 597. That view of discrimination is also necessarily encompassed in Section 504 as the integration mandate at issue in *Olmstead* was modeled on Section 504. *Id.* at 590-592.

Nor is RLUIPA the only statute in which Congress required the reasonable accommodation of religious practices as a means of preventing discrimination. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress prohibited employment "discriminat[ion] against any individual * * * because of such individual's * * * religion." 42 U.S.C. 2000e-2(a). In order to ensure that that broad antidiscrimination mandate included a requirement that employers provide reasonable accommodations to employees' religious practices, Congress defined "religion" in Title VII to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an em

ployee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). Congress's reference in Section 2000d-7 to statutes that prohibit "discrimination" should similarly be understood to include RLUIPA's requirement of such accommodations in the prison setting.

This Court has also interpreted the term "discrimination" broadly in other statutes specifically enumerated in Section 2000d-7. For example, the Court has repeatedly interpreted the general prohibition of sex discrimination in Title IX to include more than a simple ban on traditional disparate treatment. Rather, the Court has interpreted the prohibited "discrimination" to include a school's deliberate indifference to teacher-on-student or student-on-student sexual harassment, see *Davis*, 526 U.S. at 649-651; *Gebser*, 524 U.S. at 287-290; *Franklin*, 503 U.S. at 74-75, as well as retaliation for complaining about sex discrimination, *Jackson*, 544 U.S. at 174; accord *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1936 (2008); *CBOCS W., Inc.* v. *Humphries*, 128 S. Ct. 1951, 1960-1962 (2008).

RLUIPA "follows in the footsteps of a long standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.'" *Charles* v. *Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (quoting *Maggeathers* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003)); see *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Posner, J.). Because RLUIPA is a "[f]ederal statute prohibiting discrimination by recipients of Federal financial assistance," the State of Texas had clear notice,

by dint of the plain language of Section 2000d-7, that its acceptance of federal funds for its correctional system would constitute a waiver of its Eleventh Amendment immunity to RLUIPA claims, including claims for money damages.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General

SARAH E. HARRINGTON
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
SASHA SAMBERG-CHAMPION
Attorneys

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
PETITIONER,

v.

TEXAS, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION; ACLU OF TEXAS; UPTOWN PEOPLE'S LAW CENTER; WASHINGTON LAWYER'S COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN JEWISH COMMITTEE; BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; AND THE INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF PETITIONER

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JACOB R. LOSHIN
ADELE AUXIER
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
gschaerr@winston.com

Counsel for Amici Curiae
[Additional Counsel Listed Inside]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

111 30

DANIEL MACH
DAVID C. FATHI
DAVID M. SHAPIRO
American Civil Liberties Union Foundation
915 15th Street, N.W.
Washington, DC 20005
(202) 675-2330
Counsel for American Civil Liberties Union

ALAN MILLS
4413 North Sheridan
Chicago, IL 60640
(773) 769-1411
Counsel for Uptown People's Law Center

LISA GRAYBILL
ACLU Foundation of Texas
P.O. Box 12905
Austin, TX 78711
(512) 478-7300
Counsel for ACLU of Texas

DEBORAH M. GOLDEN
11 Dupont Circle, N.W.
Suite 400
Washington, DC 20036
(202) 319-1000
Counsel for Washington Lawyer's Committee for Civil Rights and Urban Affairs

AYESHA N. KHAN
518 C Street, N.E.
Washington, DC 20002
(202) 466-3234
Counsel for Americans United for Separation of Church and State

MARC STERN
RICHARD FOLTIN
165 East 56th Street
New York, NY 10022
(212) 891-1480
Counsel for American Jewish Committee

K. HOLLYN HOLLMAN
JAMES T. GIBSON
200 Maryland Avenue, N.E.
Washington, DC 20002
(202) 544-4226
Counsel for Baptist Joint Committee for Religious Liberty

QUESTION PRESENTED

Whether an individual suing a state or state official under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (2000 ed.), may seek compensatory damages.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Amici strongly believe that religious freedom is one of our most fundamental rights; that prisoners are among the most vulnerable to government incursions on their conscience; and that Congress, when it enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), justly sought to provide prisoners with a meaningful remedy against unnecessary barriers to their religious exercise.

Congress intended RLUIPA to be a strong remedy against pervasive restrictions on religious exercise in prisons. Acting under its Spending Clause authority, Congress thus sought to ensure that Federal funds are not used to burden religious exercise. As with many other civil rights statutes, Congress afforded aggrieved prisoners a cause of action against state prisons. And Congress empowered prisoners to seek all "appropriate relief"—a term of art that has long included both injunctive and monetary remedies. *Amici*, who are described in Appendix A, believe this broad remedial provision is central to the statute's ability to protect prisoners' rights to practice their religions.

The State of Texas nevertheless claims not to have understood that its acceptance of federal funds subjected it to suits for damages. But that position is implausible—both because the term of art Congress

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

used would easily have been understood to create a damage remedy and because the absence of a damage remedy would fundamentally undermine RLUIPA's purpose. As examples from cases around the country make clear, the absence of a damage remedy would leave many prisoners with no remedy at all. It is all too easy for officials to moot prisoners' injunctive claims by transferring or releasing them, injuring them only once, or selectively granting them an accommodation. Without a damage remedy, RLUIPA thus often cannot effectively deter prison misconduct. *Amici* respectfully suggest that the Court should enforce the statute according to its terms, and in so doing permit it to achieve the purposes that Congress intended.

STATEMENT OF THE CASE

Petitioner Harvey Leroy Sossamon, III, is an inmate in a Texas prison who was denied a fair opportunity to engage in Christian worship services. He was one of several inmates in disciplinary confinement who was not permitted to leave his cell to attend religious services, even though inmates were allowed to "attend educational classes, to use the law library, and to participate in other secular activities." Pet. App. 3a.

Sossamon was also one of several prisoners who was barred by prison rules from using the prison chapel for religious services, even though inmates were allowed to use the chapel for non-religious purposes, such as "weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates." Pet. App. 30a. Instead, Sossamon and others were relegated to attending worship services in a room that lacked "Christian

symbols or furnishings, such as an altar and cross, which have special significance and meaning to Christians." Pet. App. 2a-3a (quotations omitted). He was therefore unable to take part in various aspects of Christian worship, such as kneeling at an altar or receiving Holy Communion in view of a cross. Pet. App. 3a.

Challenging these impediments to the exercise of his faith, Sossamon sued the State of Texas and its prison officials. In so doing he requested declaratory, injunctive, and monetary relief. Pet. App. 5a. Sossamon alleged that the prison's restrictions violated RLUIPA, which directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is the least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. §§ 2000cc-1(a)(1), (2).

The district court granted Texas's motion for summary judgment, holding in relevant part that sovereign immunity barred claims for damages against Texas and its officers.

The Fifth Circuit affirmed the dismissal of Sossamon's damage claims, reasoning that Texas did not waive its sovereign immunity in exchange for Federal funds. The court found that "RLUIPA is clear enough to create a right of action for damages," but that its authorization of claims for "appropriate relief" was "not clear enough" to effect a waiver of state sovereign immunity. Pet. App. 23a. Having dismissed Sossamon's claim for damages, the court then went on to reject Sossamon's request for an injunction against the prison's cell-restriction policy. That claim, the court held, had been mooted by the prison's

mid-litigation decision to abandon its policy. Finally, the court remanded for further proceedings on Sossamon's request for an injunction against the prison's chapel-use policy.

SUMMARY OF ARGUMENT

RLUIPA, as we explain in Part I, was prompted by evidence that prisons throughout the country were placing unjustified restrictions on religious exercise. Congress needed a strong remedy. And as we also explain in Part I, damages are a critical part of the remedy that Congress crafted. In many cases where prisons can easily moot claims for injunctive relief, damages are the only effective remedy. Moreover, as we explain in Part II, RLUIPA gave Texas and other states ample notice that damages were part of its remedial scheme.

ARGUMENT

I. The Availability Of Monetary Relief Is Essential To RLUIPA's Purpose Of Deterring Pervasive And Unjustified Burdens On Religious Exercise.

In enacting RLUIPA, Congress sought "to protect the religious exercise of a class of people particularly vulnerable to government regulation"—persons involuntarily confined to prisons and similar institutions. *Statement of Representative Canady*, 146 Cong. Rec. H7191 (daily ed. July 27, 2000). Perhaps more than anyone else, prisoners depend on the government to provide for their basic needs; and prisoners can do almost nothing without government permission. When operating prisons, government "exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720-21 (2005).

Recognizing that a prisoner's "right to practice [his] faith is at the mercy of those running the institution," Congress aimed to "protect the civil rights of institutionalized persons" by alleviating undue restrictions on religious observance. *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (hereinafter, "*Joint Statement*"). If a state prison chooses to accept federal funds, its federally assisted programs or activities must make reasonable accommodations for sincere religious exercise. See 42 U.S.C. §§ 2000cc-1(a)-(b).

As we now show, these provisions were expressly designed to protect prisoners from pervasive, unjustified burdens on their religious exercise. And RLUIPA's damage remedy was and is central to that scheme.

A. Congress enacted RLUIPA to protect prisoners from pervasive and unjustified burdens on religious exercise.

Congress found that RLUIPA's protections were badly needed: "Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Statement* at S7775. In nine hearings over the course of three years, Congress documented all manner of "frivolous and arbitrary" burdens on religious exercise that were "frequently occurring" in prisons around the country. *Id.* at S7774-S7775.

In one case, for example, officials at an Oregon prison had deliberately recorded the sacrament of confession between a prisoner and a Roman Catholic chaplain. See *id.* at S7775 (citing *Mockaitis* v. *Har-*

cleroad, 104 F.3d 1522 (9th Cir. 1997)). Indeed, Donald W. Brooks, Director of the Prison Ministry of the Catholic Dioceses of Oklahoma, described finding a prison atmosphere in that State "charged with anti-Catholic religious bigotry." *Protecting Religious Freedom After* Boerne v. Flores *(Part II): Hearing Before Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 55 (1998).

In another case, Wisconsin officials forbade prisoners from wearing religious jewelry, such as crosses, "'without the ghost of a reason.'" See *Joint Statement* at S7775 (quoting *Sasnett* v. *Sullivan*, 197 F.3d 290 (7th Cir. 1999)). Elsewhere, Colorado officials let a prisoner attend Episcopal worship services but forbade him from taking communion. See *Ibid.*

And in Michigan, prison officials would not allow Jewish inmates to receive matzo on Passover—even though a Jewish organization had offered to provide the matzo for free. See H. Rep. No. 106-219, at 9-10 (1999). In Texas, moreover, Isaac M. Jaroslawicz of the Aleph Institute described how prison officials seemed to "fight everything Jewish," and how they treated religious requests of Jewish inmates "with suspicion, contempt, [and] hostility." *Protecting Religious Freedom After* Boerne v. Flores *(Part III): Hearing Before Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 39-41 (1998) (hereinafter, "Jaroslawicz Testimony").

Similar instances of indifference—or worse—pervaded prisons throughout the country. See, *e.g.*, *Cutter*, 544 U.S. at 717 n.5 (listing additional examples from congressional hearings).

Congress thus enacted RLUIPA to deter prison officials from burdening religious exercise and to "se-

cure redress for inmates who encountered undue barriers to their religious observances." *Cutter*, 544 U.S. at 716-17. In the words of Senators Hatch and Kennedy, RLUIPA was to "provide a remedy" to safeguard prisoners' religious freedom. *Joint Statement* at S7775.

B. Without a damage remedy, RLUIPA could not effectively deter prison misconduct.

The availability of monetary relief was and remains a critical component of the remedy that Congress crafted, and a necessary deterrent of the activity over which Congress was concerned. Although RLUIPA allows prisoners to seek injunctive and declaratory relief, those non-monetary remedies are woefully inadequate on their own to safeguard prisoners' rights.

The fundamental problem is that it is all too easy for prison officials to moot prisoners' claims for injunctive relief and, if no damages are available, avoid judicial scrutiny of misconduct. Only a claim for damages can save a cause from mootness. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8 (1978). And so, as this Court has acknowledged, injunctive relief alone may provide "no remedy at all" to civil rights plaintiffs. *Franklin* v. *Gwinnett County Pub. Schools*, 503 U.S. 60, 76 (1992). A multitude of examples demonstrate the inadequacy of injunctive relief and the critical necessity of RLUIPA's damage remedy.

1. The most common situation in which injunctive relief provides no remedy arises when an inmate is released or transferred to another facility. Such releases or transfers typically moot any prospective

relief against prisons that no longer house these inmates.

Congress was well aware of this problem when it drafted RLUIPA, having learned of one inmate's disturbing experience:

> One inmate in Texas, Brett Cook, declared himself Jewish and requested accommodation. After refusing to withdraw a religious freedom lawsuit, he suddenly found himself transferred from a minimum to maximum security prison, where, apparently, neo-Nazi skinheads were alerted as to his imminent arrival. Within 15 minutes of his being placed on the compound, he was set upon by members of a gang and killed.

Jaroslawicz Testimony at 42. Without monetary relief, Cook (or his heirs) would have no remedy. And equally important, RLUIPA would provide no deterrent to such horrific, religiously motivated conduct by prison officials.

In the years since RLUIPA's enactment, other prisoners have routinely been denied injunctive relief after transfer from an offending facility. For example, while housing two Muslim patients awaiting trial, an Illinois mental health facility prevented the patients from attending worship services. The facility's failure to provide a halal diet, particularly during Ramadan, also caused one patient to suffer malnourishment and thirty pounds' weight loss in three weeks. The facility also refused to provide a Muslim imam—despite paying for Christians and Jews to minister to its patients.

But when the patients brought a RLUIPA suit, they were unable to pursue injunctive relief because

one patient had been transferred to a different facility and another had been acquitted and released. See *Banks* v. *Dougherty*, No. 07-CV-5654, 2010 U.S. Dist. LEXIS 17443, *16-19 (N.D. Ill. Feb. 26, 2010) (dismissing, as "only speculation," the possibility that "they will, at some point in the future, be subject to the same alleged deprivations"). Because the Seventh Circuit had held that damage claims could not be brought under RLUIPA, the suit was dismissed. Not only were the two patients in this case left without any redress, but the unavailability of monetary relief effectively stripped RLUIPA's protections from all inmates who were awaiting trial or nearing the end of their sentences, and thus were likely to be transferred or released.

Similar cases abound, and the following are just a few of many other instances where transfer or release have mooted claims for injunctive relief:

- In *Quillar* v. *Cal. Dep't of Corr.*, No. S-04-1203, 2007 U.S. Dist. LEXIS 50894 (E.D. Cal. July 13, 2007), California prison officials disciplined a prisoner for wearing a beard in accordance with the dictates of his religion. The officials argued that the prisoner was "never prevented from engaging in conduct mandated by his faith" because he could "choose" to keep his beard and "suffer the consequences." *Id.* at *3-4. That so-called choice, the court held, "flies in the face of Supreme Court and Ninth Circuit precedent." *Id.* at *4 (quotation omitted). But despite finding that the alleged facts were "sufficient to establish a violation of RLUIPA," the court was obliged to rule that the prisoner's transfer to a dif-

ferent facility mooted his claims for injunctive relief. *Id.* at *10.

- In *Tyson* v. *Giusto*, No. 06-1415-KI, 2010 U.S. Dist. LEXIS 56526 (D. Ore. June 4, 2010), Oregon prison officials prevented a Muslim inmate from holding worship services with a volunteer imam—despite allowing Christian inmates to hold similar worship services. Prison officials could not explain "why allowing Muslims to pray in their units on Fridays, just as the Christians do, is not an acceptable alternative." *Id.* at *11. Nevertheless, the prisoner's release from prison mooted his request for injunctive relief.

- In *Henderson* v. *Ayers*, No. 06-4348-VBF(RC), 2008 U.S. Dist. LEXIS 108034 (C.D. Cal. Mar. 14, 2008), California officials also prevented a Muslim inmate from attending worship services. The court denied the officials' motion to dismiss, and discovery ensued—only to have the complaint dismissed as moot when the prisoner was transferred to a different facility.

- In *Simmons* v. *Herrera*, No. 09-0318-JSW(PR), 2010 U.S. Dist. LEXIS 39819 (N.D. Cal. Mar. 26, 2010), officials denied a prisoner access to Native American religious services, while services for other faiths were allowed. His suit for injunctive relief was dismissed when he was transferred to a different prison.

In all of these cases, courts are powerless to order injunctive remedies. And so, without a damage rem-

edy, the unfortunate message to prison officials would be clear: You may violate these temporary prisoners' religious rights with impunity, for no remedy protects them.

2. Transfer and release, however, are only two of many ways prison officials can evade injunctive remedies. Indeed, without monetary damages, prisoners would generally have *no* remedy for violations of their religious rights that occur only once. See *O'Shea* v. *Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief * * * if unaccompanied by any continuing, present adverse effects.").

A California mental hospital, for example, denied an involuntarily committed patient access to kosher meals for Passover. Jews observe the Passover holiday for eight days, during which time they follow special kosher dietary restrictions. Although the institution *promised* to provide the Jewish patient with kosher meals during the Passover holiday, in fact the meals were not provided. *Sokolsky* v. *W.T. Voss*, No. 07-CV-594, 2009 U.S. Dist. LEXIS 67070, *3 (E.D. Cal. July 24, 2009). Then, when the patient notified officials that he was not receiving the promised meals, they subjected him to discipline for his complaints. *Id.* at *4.

What is more, the patient was faced with a stark choice: As the court put it, "he was forced to either violate his sincerely-held beliefs or starve." *Id.* at *10. He followed his beliefs—and went unfed for eight days. *Id.* at *9.

The court could "hardly imagine a burden on religious exercise that is more substantial" than the

forced choice between religious conscience and starvation. *Id.* at *10. Yet, there was no strong indication that the patient's eight days of suffering would likely recur with the "level of probability" needed for an injunction; indeed, the plaintiff did not even attempt to obtain injunctive relief. *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). Nor, of course, could a prospective remedy redress the starvation he had endured. Without a damage remedy, then, the patient had no remedy at all.[1]

For this plaintiff and other institutionalized persons in similar situations, the absence of a damage remedy would render RLUIPA a dead letter. And once again, the absence of such a remedy deprives RLUIPA of the deterrent effect that Congress intended.

3. Another common way prison officials have mooted claims for injunctive relief has been to grant a religious accommodation only after being sued—sometimes on the eve of trial. Indeed, in this very case, prison officials changed their rules to permit inmates such as Sossamon to attend worship services while on cell restriction. This change came not when Sossamon first brought his grievance to the prison's attention, nor as a settlement or accommodation when he filed his suit. Rather, Texas changed its policy only years later, while Sossamon's suit was pending on appeal. Although a defendant's voluntary cessation of unlawful behavior generally will not moot a claim unless the behavior cannot reasonably be ex-

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[1] Although the court permitted the plaintiff's individual-capacity claim for damages to proceed, many circuits, including the Fifth Circuit below, have refused to allow individual-capacity claims under RLUIPA. *See* Pet. App. 18a-20a.

pected to recur, the court of appeals subjected Texas to a "lighter burden" by *assuming* that the State's actions were "not mere litigation posturing." Pet. App. 11a. Having held that Sossamon had no damage remedy, the court dismissed Sossamon's cell-restriction claim as moot—leaving him no recourse to challenge the deprivation of his rights.

Sossamon's experience, moreover, is hardly unique. The following are just a few of many examples where prison officials have mooted claims for injunctive relief by changing their policies:

- In *Figel* v. *Overton*, No. 2:03-CV-216, 2006 WL 625862 (W.D. Mich. Mar. 9, 2006), Michigan officials confiscated—on five separate occasions—religious texts a prisoner had ordered from the Philadelphia Church of God. Because the court held that a change in policy mooted claims for injunctive and declaratory relief, the court noted that only the possibility of damages under RLUIPA and the First Amendment protected the "public interest in having the legality of a practice settled." *Id.* at *2.
- In *Williams* v. *Beltran*, 569 F. Supp. 2d 1057, 1059 (C.D. Cal. 2008), California prison officials forced a Muslim prisoner to shave his beard in violation of the requirements of his religion. The court held that a change in policy mooted the claims for injunctive relief, and that "[a]bsent the availability of monetary relief, Plaintiff lacks any remedy for his alleged RLUIPA claim." *Id.* at 1065.

- In *Dawson* v. *Burnett*, 631 F. Supp. 2d 878, 881, 894 (W.D. Mich. 2009), a Buddhist prisoner, who "submitted numerous exhibits which tend to demonstrate that his religious beliefs are sincere," was denied the vegan diet required by his religion. The prison mooted injunctive claims under RLUIPA by reversing course. *Id.* at 887.

In these circumstances, prisoners receive no redress for the past abuses they have suffered, and they receive no court-ordered injunction to assure their rights in the future. Their religious freedom is reduced to an indulgence, not a right. And RLUIPA ceases to provide a deterrent if prisoners' claims can be ignored, then belatedly granted simply to make the resulting litigation go away.

4. Worse still is the potential for prison officials to deliberately moot the claims of particular inmates as a means of insulating an unlawful *policy* from review. For example, as of 2005, the Texas Department of Criminal Justice was one of few prison systems in the country that refused to provide kosher food to Jewish inmates. Brief of Plaintiff-Appellant 10, *Moussazadeh* v. *Texas Dep't of Criminal Justice*, No. 9-40400 (5th Cir.). A Jewish inmate thus sought an injunction requiring that kosher food be provided. But after more than a year of litigation—just before discovery was to begin—Texas transferred the prisoner to a facility that *would* provide him kosher food, and then persuaded the trial court to dismiss the prisoner's claim as moot. *Moussazadeh* v. *Texas Dep't of Criminal Justice*, No. G-07-574, 2009 U.S. Dist. LEXIS 25568 (S.D. Tex. Mar. 26, 2009).

The State's Jewish dietary policy, however, was not changed to offer kosher meals to all Jewish inmates statewide. Indeed, the policy provided that kosher meals shall only be offered in an "Enhanced Jewish Designated Unit" to which not every Jewish inmate would be entitled to transfer. Brief of Plaintiff-Appellant 12, *Moussazadeh* v. *Texas Dep't of Criminal Justice*, No. 9-40400 (5th Cir.).

At the same time that Texas mooted the claim of this prisoner, who was represented by counsel, the State offered no accommodation to a *pro se* prisoner who brought the same claim. The State instead litigated that claim to a favorable judgment. See *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007).

A second example of insulating an unlawful policy by mooting individual claims can be found in Illinois. For many years, the Illinois Department of Corrections has refused to offer special meals for prisoners with religious dietary restrictions unless a prisoner's faith "*requires* adherence to a particular diet." 20 Ill. Adm. Code § 425.70(c). That rule is flatly outlawed by RLUIPA, which protects religious exercise "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).[2] Al-

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[2] Congress had good reason to expressly forbid officials from inquiring into the "requirements" of any particular religion. For one thing, it would disfavor many religions that do not conceptualize their faith in terms of "requirements." *Cf. Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). And for another, it would put the government in a position of deciding what constitutes "true" religious observance. *Cf. Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (warning that "religious beliefs need not be acceptable, logical, consistent, or com-

though courts have repeatedly indicated that the regulation is unlawful, efforts to moot prisoner claims have prevented courts from enjoining it.

In one case, for example, a court held that the regulation required a prisoner "to establish exactly what RLUIPA does not require"—namely, the centrality of a religious belief to a faith. *Koger* v. *Bryan*, 523 F.3d 789, 798 (7th Cir. 2008). Yet, the prisoner's release rendered moot his request for an injunction. *Id.* at 804.

Soon thereafter, the *same violation* happened again. This time, a Lutheran chaplain denied a Catholic inmate a meatless diet, because, in the chaplain's estimation, abstaining from meat is not "true" penance. *Nelson* v. *Miller*, 570 F.3d 868, 872 (7th Cir. 2009). Although two Catholic priests wrote to the Lutheran chaplain in support of the prisoner's request—explaining that it was consistent with a rule espoused by St. Benedict, who had been the patron saint of the prisoner's childhood parish and school—the chaplain "did not give the letters from [the priests] any weight." *Id.* at 871, 873. Without the vegetarian diet, the prisoner abstained from the meat served in his standard diet. As a result, he lost over forty pounds, his "bones began to protrude," and he had to be hospitalized for losing so much weight. *Id.* at 874, 880. Yet here too, injunctive relief was denied because the warden ultimately ordered that the inmate receive a vegetarian diet. *Id.* at 882. Without a damage remedy, the State cannot be made to pay for its policy, and the policy persists.

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prehensible to others in order to merit First Amendment protection").

As the above examples attest, monetary damages are critical to safeguarding the rights RLUIPA seeks to protect. Indeed, damages are often the *only* available remedy for prisoners who suffer violations of their religious rights.[3] And they are sometimes the *only* way to induce a prison to comply with RLUIPA's substantive requirements. It would subvert Congress's purpose to strip RLUIPA of that remedy.

II. By Authorizing All Appropriate Relief For Violations Of RLUIPA, Congress Gave States Ample Notice That They Could Be Sued For Damages.

That the damage remedy was a key part of RLUIPA's remedial scheme should have been obvious to Texas when it chose to accept federal funds for its prisons. Congress provided an express right of action for prisoners to "assert a violation of this Act" against state governments. 42 U.S.C. §§ 2000cc-2(a), -5(4)(A). Congress made clear to states that they could be sued so long as they chose to accept federal funds. 42 U.S.C. § 2000cc-1(b)(1). And Congress authorized courts to grant all "appropriate relief." 42 U.S.C. § 2000cc-2(a).

Thus, nobody disputes that Texas knowingly waived its immunity from suit. Rather, the issue for

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[3] Although some courts have held that the Prison Litigation Reform Act (PLRA) bars compensatory damages unless the plaintiff alleges a physical injury, many RLUIPA claims *do* involve physical injury. And even where no physical injury occurs, nominal damages—at a minimum—are nevertheless available under the PLRA. Even those limited damages serve to avoid outright dismissal of a suit and ensure jurisdiction for a declaratory judgment. *See, e.g., Keup v. Hopkins*, 596 F.3d 899, 904 (8th Cir. 2010).

this Court is simply whether the right of action Congress indisputably created gave states sufficient notice that they could be sued *for damages*. Whether the analysis springs from the Spending Clause or the Eleventh Amendment, this Court has focused on whether a state's choice to subject itself to suit is made "knowingly, cognizant of the consequences of [its] participation" in a Federal spending program. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); see also *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (requiring "unambiguous" expression). As we explain, it would have been obvious to states that RLUIPA's authorization of all "appropriate relief" subjected them to damages.

1. The most significant error in the Fifth Circuit's analysis was to assume that RLUIPA's term "appropriate relief" was ambiguous—thereby requiring that such ambiguity be "resolved" by the canon calling for strict construction of waivers of sovereign immunity. Pet. App. 23a. But the term "appropriate relief" is *not* ambiguous; it is a term of art from this Court's jurisprudence that has long been understood to refer to both injunctive and monetary relief.

For example, in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court considered a civil rights statute that had been construed to contain an implied right of action. Unlike the RLUIPA statute here, the statute in *Franklin* made no express reference to remedies—or even to any cause of action. The Court nevertheless read the statute to make available "all appropriate relief," which included damages. *Id.* at 68. The Court explained that its decision to imply those remedies was "hardly revolutionary," tracing such implied remedies back to English common law and through centuries of this

Court's decisions. *Id.* at 66. The "traditional presumption in favor of all appropriate relief," the Court explained, "has been the prevailing presumption in our federal courts since at least the early 19th century." *Id.* at 71-72.

Franklin's principal significance for this case, however, is not the fact that the Court chose to read "all appropriate remedies" into the statute at issue—for it need not do so here. Rather, *Franklin* is significant because it made clear that the term "appropriate relief" has long been understood to include monetary damages.

This Court reaffirmed *Franklin* in *Barnes* v. *Gorman*, explaining that the "appropriate relief" it would imply into a civil rights statute enacted pursuant to the Spending Clause are "those remedies traditionally available in suits for breach of contract." 536 U.S. 181, 187 (2002). The Court held that "appropriate relief" did not include punitive damages, but *did* include "injunction" *and* "compensatory damages." *Id.* at 187.

By using a term of art borrowed from this Court's decisions, Congress thus drafted RLUIPA to *expressly include* a reference to the "appropriate relief" that this Court had previously only implied in other statutes. And given a century of precedent using that term to refer to compensatory as well as injunctive relief, there could be no confusion about the meaning of the term.

Indeed, in employing such a term of art, Congress relied on this Court's longstanding rule that, "where Congress borrows terms of art," the term retains "the meaning its use will convey to the judicial mind." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952);

see also, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 615 (2001) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."); *Carter* v. *United States*, 530 U.S. 255, 266 (2000) ("[W]e have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law."); *Neder* v. *United States*, 527 U.S. 1, 21 (1999) (referring to "well-established rule of construction" that terms of art are accorded their settled meaning); *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989) ("* * * Congress means to incorporate the established meaning of [terms of art]."); *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense.").

2. The only way to read RLUIPA's language as ambiguous is thus to tear it away from all legal context and treat the words as though they were invented for the first time by RLUIPA's drafters. Of course, most every word is ambiguous when shorn of its context, and these words are no different. But that is not how this Court typically construes statutes, nor is it how a state—or anyone else—reads them. *E.g.*, *Johnson* v. *United States*, 130 S.Ct. 1265, 1270 (2010) ("[u]ltimately, context determines meaning"). It is one thing to require that states receive fair notice of the consequences of taking Federal dollars, but it is quite another to presume a state's ignorance of terms commonly used by this Court.

It is no wonder, then, that this Court has deemed other civil rights statutes to have waived federal sovereign immunity when they used language similar to the language Congress used here. When, for example, Congress authorized "such relief (including injunctions) as may be appropriate" to remedy a violation of the Labor-Management Reporting and Disclosure Act, this Court deemed that language sufficient to permit suits for damages. *Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO* v. *Hardeman*, 401 U.S. 233, 239-40 (1971). And when Congress authorized "appropriate remedies"—language almost identical to the phrase used in RLUIPA—to remedy a violation of Title VII of the Civil Rights Act of 1964, this Court found the language enough to waive federal sovereign immunity for damages. *West* v. *Gibson*, 527 U.S. 212 (1999).

The result in this case should be no different.

CONCLUSION

The limitation that the court below engrafted onto RLUIPA's remedy provision flatly contravenes *both* the statute's plain language and Congress' plain intention to craft an effective means for protecting prisoners' religious freedom. The judgment below should be reversed.

Respectfully submitted.

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
JACOB R. LOSHIN
ADELE AUXIER
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

Counsel for Amici Curiae

DANIEL MACH
DAVID C. FATHI
DAVID M. SHAPIRO
American Civil Liberties Union Foundation
915 15th Street, N.W.
Washington, DC 20005
(202) 675-2330
Counsel for American Civil Liberties Union

ALAN MILLS
4413 North Sheridan
Chicago, IL 60640
(773) 769-1411
Counsel for Uptown People's Law Center

LISA GRAYBILL
ACLU Foundation of Texas
P.O. Box 12905
Austin, TX 78711
(512) 478-7300
Counsel for ACLU of Texas

DEBORAH M. GOLDEN
11 Dupont Circle, N.W.
Suite 400
Washington, DC 20036
(202) 319-1000
Counsel for Washington Lawyer's Committee for Civil Rights and Urban Affairs

AYESHA N. KHAN
518 C Street, N.E.
Washington, DC 20002
(202) 466-3234
Counsel for Americans United for Separation of Church and State

MARC STERN
RICHARD FOLTIN
165 East 56th Street
New York, NY 10022
(212) 891-1480
Counsel for American Jewish Committee

K. HOLLYN HOLLMAN
JAMES T. GIBSON
200 Maryland Avenue, N.E.
Washington, DC 20002
(202) 544-4226
Counsel for Baptist Joint Committee for Religious Liberty

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APPENDIX

APPENDIX A:
LIST OF *AMICI*

The *American Civil Liberties Union* (ACLU) is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The *ACLU of Texas* is one of its statewide affiliates. Throughout its 90-year history, the ACLU has been deeply involved in protecting religious rights, as well as the rights of prisoners, and has appeared before this Court in numerous cases involving those issues, both as direct counsel and as *amicus curiae*. To further its work in these areas, the ACLU has created both a National Prison Project and a Program on Freedom of Religion and Belief.

The *Uptown People's Law Center* is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy and education for poor and working people in Chicago, the Law Center also provides legal assistance to people housed in Illinois' prisons in cases related to their confinement. The Law Center has provided direct representation to over 100 prisoners, including in several cases alleging violation of religious rights under RLUIPA. Most recently, the Law Center represented the plaintiff in *Nelson* v. *Miller*, 570 F.3d 868, 872 (7th Cir. 2009), the circumstances of which are discussed in this brief.

The D.C. Prisoners' Project of the *Washington Lawyer's Committee for Civil Rights and Urban Affairs* (the "Prisoners' Project"), a non-profit public interest organization, has sought to eradicate discrimination and fully enforce the nation's civil rights laws for over 40 years. Since the Prisoners' Project was

founded in 1989, it has engaged in broad-based litigation, improving medical and mental health services, reducing overcrowding, protecting access to courts and the ability to participate in religious activities, and seeking to improve overall conditions at correctional facilities wherever District of Columbia inmates are held. Individuals serving felony sentences under the D.C. Code are held under the supervision of the federal Bureau of Prisons (BOP), which can house D.C. prisoners in any of 137 different BOP facilities and in any number of state prisons with which the BOP has cooperative arrangements.

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to the preservation of the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has regularly been involved—as a party, as counsel, or as an amicus curiae—in church-state cases before this Court and other federal and state courts throughout the nation.

The *American Jewish Committee* was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans.

The *Baptist Joint Committee for Religious Liberty* ("BJC") is a 74-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting individuals and churches across the nation. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensuring

religious liberty for all Americans. The BJC has participated as *amicus curiae* in many of the major religious liberty cases before this Court. The BJC specifically has advocated for the religious liberty rights of prisoners, leading the broad coalition that urged Congress to enact the Religious Land Use and Institutionalized Persons Act of 2000.

The Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions, as well as members from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy. The Interfaith Alliance Foundation joins this *amicus* brief, is a 501(c)(3) non-profit organization. Its parent organization is The Interfaith Alliance, Inc., which is a 501(c)(4) organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance Foundation or The Interfaith Alliance, Inc.

AMICUS CURIAE BRIEF

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No. 08-1438

IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
Petitioner,

v.

TEXAS, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

KEVIN J. HASSON
ERIC C. RASSBACH
Counsel of Record
HANNAH C. SMITH
LUKE W. GOODRICH
LORI H. WINDHAM
DIANA M. VERM
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St., N.W.
Suite 220
Washington, DC 20007
(202) 955-0095

Counsel for Amicus Curiae

706 48

QUESTION PRESENTED

Whether an individual may sue a State or state official in his or her official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has litigated numerous cases on behalf of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA). For example, the Becket Fund represented the prisoners in both *Benning* v. *Georgia*, 391 F.3d 1299 (11th Cir. 2004), and *Smith* v. *Allen*, 502 F.3d 1255 (11th Cir. 2007)—two of the Eleventh Circuit cases underlying the circuit split at issue here. It has represented the interests of Catholic, Greek Orthodox, Jewish, Muslim, Protestant, and Sikh prisoners in matters resolved both prior to and during litigation. The Becket Fund also served as lead counsel for a coalition of over 50 civil rights and religious groups in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), submitting an *amicus* brief defending the constitutionality of RLUIPA. And it currently represents a prisoner in the Texas prison system who seeks kosher dietary accommodations that Texas has thus far refused to provide.

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *Amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Becket Fund submits this brief to explain how RLUIPA's authorization of damages is not only clear, but critical to achieving the statute's goals. Without the possibility of damages—even nominal damages—prisoners are left at the mercy of state prison systems, which can (and do) easily moot meritorious claims by providing temporary religious accommodations. Recognition of damages under RLUIPA will have a negligible effect on state coffers, but a profound effect on the fundamental right RLUIPA was designed to protect.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Everyone agrees that Texas waived its sovereign immunity to suits for "appropriate relief" under RLUIPA. Br. in Opp. 12-13. Everyone also agrees that, in the absence of sovereign immunity, "appropriate relief" includes compensatory and nominal damages. Br. in Opp. 13. The only question is whether the inclusion of compensatory and nominal damages in the term "appropriate relief" was clear enough to put Texas on notice that it faced potential liability.

RLUIPA is plenty clear. "Appropriate relief" appears over 100 times in the United States Code, and Congress routinely uses that term to encompass compensatory and nominal damages. This conclusion is also strengthened by RLUIPA's structure and legislative history. And Texas's own code repeatedly uses the phrase "appropriate relief" to include monetary damages. Thus, Texas had ample notice that RLUIPA authorized suits for damages.

II. RLUIPA's authorization of damages serves a narrow—but critical—purpose. It ensures that in-

mates have some way to vindicate the rights guaranteed by Congress. The waiver of immunity is exceedingly narrow because the Prison Litigation Reform Act bars almost all monetary relief except nominal damages. These nominal damages serve not to enrich plaintiffs, but to vindicate fundamental rights. Nominal damages preserve cases from mootness, a frequent occurrence in prison litigation. Without nominal damages to keep claims live, States are encouraged to engage in gamesmanship and to moot meritorious claims. And because nominal damages have only a *de minimis* effect on state coffers, they do not undermine the purposes of the Eleventh Amendment.

In sum, RLUIPA's waiver is not only clear, it is necessary to carry out Congress's purpose.

ARGUMENT

I. The phrase "appropriate relief" put Texas on notice that RLUIPA authorizes compensatory and nominal damages.

By accepting federal funds, it is undisputed that Texas waived its sovereign immunity to suits for "appropriate relief" under RLUIPA. *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981); Br. in Opp. 12-13. It is also undisputed that—as a matter of statutory interpretation—the term "appropriate relief" includes compensatory and nominal damages. Br. in Opp. 13 ("monetary relief may very well be 'appropriate'" where defendant is a county or municipality). The remaining dispute is over whether the phrase "appropriate relief" is also clear enough to put Texas on notice about the remedies RLUIPA provides.

It is. As explained below, Congress has routinely used "appropriate relief" elsewhere in the United States Code to indicate the availability of compensatory and nominal damages. Texas uses that term the same way in its own statutes. The structure and history of RLUIPA also confirm the meaning of the term. And Texas is charged with knowing that damages have been awarded under the land use provisions of RLUIPA. Thus, RLUIPA is sufficiently clear to put Texas on notice that accepting federal funds would subject it to suits for damages.

A. Congress has routinely used the term "appropriate relief" to include compensatory and nominal damages.

A review of the United States Code indicates that Congress routinely uses the term "appropriate relief" to indicate the availability of compensatory and nominal damages. "Appropriate relief" occurs in 120 sections of the United States Code.[2] Table 1 provides an overview of how the term has been used. The Appendix offers a more detailed, annotated version.

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[2] A Westlaw search for "appropriate relief" in the "USC" database yields 151 results, but thirty-one of these results are from sources other than the United States Code, such as the Code of Federal Regulations or court rules. Additionally, sixteen of the 120 sections occur in the Administrative Procedure Act ("APA"), which has its own definition of regulatory relief, thus rendering those fifteen instances irrelevant here.

Table 1

Forms of "Appropriate Relief"		#
Without modification		36
Excluding damages		2
"Including" or "Including, but not limited to"		47
Including compensatory damages	4	
Including compensatory and exemplary or punitive damages	10	
Including damages	4	
Including compensatory, statutory, and punitive damages	1	
Including monetary relief	1	
Including punitive damages and civil penalties	3	
Damages included in separate subsection	1	
Including other forms of specialized relief	23	
Administrative Procedure Act reference		16
"Other appropriate relief"		19
"[I]njunctive, declaratory, or other appropriate relief"	1	
"[D]amages or secure an accounting or other appropriate relief"	1	
"[D]amages or other appropriate relief"	1	
Other forms of specialized relief including other appropriate relief	16	
Total Appearances		120

A study of the use of "appropriate relief" in the United States Code indicates that it is an umbrella term routinely used to encompass nominal and compensatory damages. Thirty-six of the uses, including RLUIPA, use no modifying phrases (such as "including" or "excluding"). See App. In many of these instances, the context strongly supports a reading of "appropriate relief" that includes damages. See *Lewis* v. *United States*, 445 U.S. 55, 60-61 (1980) (without modification, a term is construed broadly). For instance, the Fair Housing Act authorizes "appropriate relief," 42 U.S.C. § 3613(a)(1), which is understood to include damages. See, *e.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982) (plaintiffs had standing to sue for damages under Fair Housing Act).

More importantly, when Congress has modified the term "appropriate relief," it has done so in a way that shows "appropriate relief" already includes damages. For example, to our knowledge, only twice has Congress authorized appropriate relief and then excluded a particular remedy from that term. And in both instances, Congress modified the term *to exclude damages*. See 15 U.S.C. § 797(a)(5) (authorizing "a civil action for appropriate relief," but stating that "[n]othing in this paragraph shall authorize any person to recover damages"); 42 U.S.C. § 6395(e)(1) (authorizing "an action * * * for appropriate relief," but stating that "[n]othing in this subsection shall authorize any person to recover damages").

If Congress must modify the term to *exclude* damages, it stands to reason that "appropriate relief" must otherwise *include* damages. It also demonstrates that Congress knows how to exclude damages as a form of appropriate relief, should it so choose. Cf. *Hardt* v. *Reliance Standard Life Ins. Co.*, 130

S.Ct. 2149, 2156 (2010) (contrasting paragraphs in ERISA show that "Congress knows how to impose express limits" when it so intends).[3]

Similarly, forty-seven other uses of "appropriate relief" add the modifiers "including," or "including but not limited to," indicating that the term "appropriate relief" encompasses specific types of relief. Twenty-three of these provisions include some form of damages, and another includes "monetary relief." See App. The word "including" is commonly understood to serve an "illustrative and not limitative" function. *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); see also *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *Black's Law Dictionary* 777-78 (8th ed. 2004) ("The participle *including* typically indicates a partial list * * * . But some drafters use phrases such as *including without limitation* and *including but not limited to*—which mean the same thing."). In other words, when Congress says "appropriate relief, including damages," that means that "damages" is an illustrative example of the larger category of "appropriate relief"—confirming that Congress understands damages to be included within the phrase "appropriate relief."

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[3] Congress has also demonstrated that it knows how to avoid waivers of sovereign immunity when needed. See 18 U.S.C. § 2346 (authorizing "appropriate relief," but stating, "Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe * * * or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe.")

Nor can it be surprising to Texas that Congress would use "appropriate relief" to provide for compensatory and nominal damages; that is just how this Court has used the term. As the Petitioners have explained, Pet. Br. 14-15, in *Franklin* v. *Gwinnett County Public Sch.*, this Court read the term "appropriate relief" into Title IX of the Civil Rights Act and concluded that "appropriate relief" included compensatory and nominal damages. 503 U.S. 60, 73 (1992). Only months later, Congress purposely incorporated the "appropriate relief" language into RFRA, which later carried over verbatim into RLUIPA. The most logical conclusion is that Congress intended to include damages in RLUIPA by invoking the term "appropriate relief"—a term that included damages in *Franklin*.

Moreover, Texas can hardly claim ignorance of the meaning of "appropriate relief" when its own laws use the term the same way Congress does. See, *e.g.*, Tex. Prop. Code Ann. § 301.112(a) ("the commission may order the appropriate relief, including actual damages, reasonable attorney fees, court costs, and other injunctive or equitable relief"); Tex. Civ. Prac. & Rem. Code Ann. § 96.002(b) ("A person who is liable under Subsection (a) is liable * * * for damages and any other appropriate relief"). In fact, the Texas Attorney General himself is charged with enforcing the Texas fair housing laws by asking courts to "award other appropriate relief, including monetary damages, reasonable attorney fees, and court costs." Tex. Prop. Code Ann. § 301.132(b)(2).

B. Other provisions of RLUIPA indicate that "appropriate relief" includes compensatory and nominal damages.

Other provisions of RLUIPA confirm that "appropriate relief" includes compensatory and nominal damages. First, in the same section authorizing private parties to bring an action against a State for "appropriate relief," RLUIPA authorizes the federal government to bring an action for "injunctive or declaratory relief." 42 U.S.C. § 2000cc-2(a), (f). Under the Fifth Circuit's reasoning, these two phrases mean the same thing. But why would Congress authorize identical relief using two completely different phrases? The better understanding is that "differing language in * * * two subsections [does not have] the same meaning," *Russello* v. *United States*, 464 U.S. 16, 23 (1983), and that "appropriate relief" is broader than just "injunctive or declaratory relief." See also Pet. Br. 21.

Second, RLUIPA provides that "nothing in this [statute] shall be construed to amend or repeal the Prison Litigation Reform Act of 1995." 42 U.S.C. § 2000cc-2(e). One of the primary purposes of the PLRA was to limit damages awards to prisoners. Pet. Br. 22-23. Thus, the implication of this provision is that Congress knew it was authorizing damages, but did not want to disturb the damages limitations in the PLRA.

Third, RLUIPA contains a rule of construction stating that "[t]his Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this [Act] and the Constitution." 42 U.S.C. § 2000cc-3(g). This provision, too, counseled Texas against giving the term

"appropriate relief" an unnecessarily narrow interpretation.

C. RLUIPA's legislative history unambiguously indicates that "appropriate relief" includes compensatory and nominal damages.

RLUIPA's legislative history also put Texas on notice that "appropriate relief" includes compensatory and nominal damages. Before passing RLUIPA, Congress considered the remedies that would be granted. As part of the congressional record, Douglas Laycock, professor and author of the leading casebook on remedies, *Modern American Remedies: Cases and Materials* (3d ed. 2002), presented written testimony to the House Subcommittee on the Constitution and to the Senate Judiciary Committee on the bill that ultimately became RLUIPA. His analysis explained that "appropriate relief includes declaratory judgments, injunctions and *damages*." *Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 219 (May 12, 1999) (statement of Douglas Laycock, Professor, University of Texas Law School) (emphasis added). This is further evidence that Congress intended "appropriate relief" to carry its established meaning and to authorize suits for compensatory and nominal damages.

D. Texas cannot claim ignorance of damages awards in RLUIPA land use cases.

Texas also cannot claim ignorance of RLUIPA damages awards. Two circuits have acknowledged their existence in land use cases. *Lighthouse Institute for Evangelism, Inc.* v. *City of Long Branch*, 510 F.3d

253, 273 (3d Cir. 2007) (remanding for award of compensatory damages); *Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 849-50 (7th Cir. 2007) (finding damages available, but time-barred). Several cases involve published jury verdicts for damages. See, *e.g.*, *Reaching Hearts Int'l, Inc.* v. *Prince George's County*, 368 F. App'x 370 (4th Cir. 2010) (affirming verdict including $3,714,822.36 in damages); *Chabad of Nova, Inc.* v. *City of Cooper City*, No. 0:07-cv-60738 (S.D. Fla. Aug. 8, 2008) (jury verdict for $325,750 in damages). And courts routinely rely on land use cases to interpret RLUIPA's prisoner provisions (and vice versa).[4] See, *e.g.*, *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (citing prisoner case); *Living Water Church of God* v. *Charter Twp. of Meridian*, 258 F. App'x 729, 736-37 (6th Cir. 2007) (same); *Smith* v. *Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (citing land use case); *Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (same).

It is inevitable that the two halves of RLUIPA would be interpreted in tandem, since both share the unique "substantial burden" provision,[5] 42 U.S.C.

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[4] Thus, the Court's decision in this case may have a significant effect on how lower courts interpret RLUIPA's land use provisions.

[5] As Petitioner notes, Pet. Br. 38-43, RLUIPA's "substantial burden" provisions, like the substantial burden provision of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a), prohibit not just discrimination, but also a wide variety of unintentional burdens on religious exercise. See *City of Boerne* v. *Flores*, 521 U.S. 507, 534-35 (1997). Courts must examine whether government has placed an objective burden—a prohibition, a penalty, a fine—on the particular religious exercise the particular claimant wishes to engage in. See, *e.g.*, *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33 (1st Cir. 2007) (rejecting the argument that a burden on preaching was insubstantial because the

§§ 2000cc(a)(1), 2000cc-1(a), and both share the "appropriate relief" remedies section, 42 U.S.C. § 2000cc-2(a). Thus, if Texas is on notice that courts have uniformly interpreted "appropriate relief" to include damages in the land use context, it also has adequate notice that "appropriate relief" includes damages in the prisoner context.

II. In the unique context of prisoner litigation, RLUIPA's authorization of compensatory and nominal damages serves a narrow but important purpose.

RLUIPA's authorization of compensatory and nominal damages is narrow but important. It is narrow because the PLRA bars the vast majority of suits for compensatory damages; thus as a practical matter RLUIPA primarily authorizes suits for nominal damages. But nominal damages are crucial because they allow inmates to preserve meritorious claims against mootness—a very common phenomenon in the prison context, and a significant barrier to the protection RLUIPA was intended to provide.

A. RLUIPA's authorization of compensatory and nominal damages is narrow because the PLRA protects States from the vast majority of damages suits.

RLUIPA's authorization of compensatory and nominal damages poses little threat to state treasuries because the availability of damages is "severely circumscribed" by the PLRA. *Smith*, 502 F.3d at 1271. Under the PLRA, "[n]o Federal civil action may

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plaintiff could engage in other forms of religious exercise); *Cf. Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006) (substantial burden measured "to the person").

be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Since most RLUIPA claims do not involve physical injury, most are ineligible for compensatory damages. See, *e.g.*, *Mayfield* v. *Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605 (5th Cir. 2008); *Koger* v. *Bryan*, 523 F.3d 789, 804 (7th Cir. 2008); but see *Cardinal* v. *Metrish*, 564 F.3d 794 (6th Cir. 2009) (claim for compensatory damages where denial of kosher diet led inmate to go without food for eight days).[6]

But the PLRA does not bar claims for nominal damages. See, *e.g.*, *Fegans* v. *Norris*, 537 F.3d 897, 908 (8th Cir. 2008). That means that if a RLUIPA claim involves damages at all, the claim will likely be limited to nominal damages. Thus, by accepting federal funds, States are not exposing themselves to significant damages liability; they are waiving their sovereign immunity only in the narrowest sense.

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[6] *Cardinal* is the unusual case in which a RLUIPA violation, standing alone, might permit compensatory damages. In most cases of physical harm or force, the physical harm alone would be actionable, meaning that RLUIPA adds little. See, *e.g.*, *Bryant* v. *Rich*, 530 F.3d 1368 (11th Cir. 2008) (prisoners subjected to violence by guards); *Bell* v. *Konteh*, 450 F.3d 651 (6th Cir. 2006) (§ 1983 action for failure to protect prisoner from violence by other prisoners). As the *Cardinal* dissent recognized, damages for physical harm might be available in that case, but would depend upon further development of the record. See *Cardinal*, 564 F.3d at 803 04 (Clay, J., dissenting).

B. RLUIPA's authorization of compensatory and nominal damages is important because it prevents States from gaming RLUIPA by voluntarily mooting suits for injunctive relief.

RLUIPA's narrow authorization of nominal damages serves a vital purpose: the preservation of claims. As this Court explained in *Carey* v. *Piphus*, nominal damages are appropriate in cases where the plaintiff alleges the violation of an absolute right. 435 U.S. 247, 266–67 (1977). Their purpose is not to compensate the plaintiff, but to "mak[e] the deprivation of such rights actionable" in the absence of a compensable injury. *Ibid.*; see also *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 317, 319 (2d Cir. 1999) (nominal damages "guarantee that unconstitutional acts remain actionable"). A valid claim of nominal damages also typically defeats a claim of mootness. 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.3 (3d ed. 2008).

Mootness is a serious issue in prisoner cases. States may provide or deny inmates religious accommodations at will, and may transfer inmates among units with different rules and accommodations at almost any time. See, *e.g.*, *Meachum* v. *Fano*, 427 U.S. 215, 228 (1976) (prisoner's interest in remaining at a particular prison "is too ephemeral and insubstantial to trigger procedural due process protections" because under state law "prison officials have discretion to transfer him for whatever reason or for no reason at all"). This makes it very easy for a defendant government to moot a prisoner case. Releasing a prisoner from custody, transferring him to a new unit, or temporarily granting a religious ac-

commodation can all moot a prisoner's case. See Br. for *Amici Curiae* American Civil Liberties Union, *et al.* at 9. Moreover, the typical exceptions to mootness doctrine—voluntary cessation and capable of repetition but evading review—are much weaker in the prison context. See *infra*. Thus, claims for nominal damages are necessary to ensure that RLUIPA's protections are given full effect.

C. Texas and other States already engage in RLUIPA gamesmanship.

Nominal damages are particularly important to keep prison systems from strategically using mootness to their advantage. Two recent cases from Texas illustrate this point.

In *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007), and *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, No. 3:07-CV-00574 (S.D. Tex. filed Oct. 12, 2005), two different prison inmates filed suit under RLUIPA, each challenging Texas's refusal to provide Jewish inmates with kosher food. *Baranowski* involved a *pro se* plaintiff who entered the system as Catholic, then changed his religious designation to Jewish and sued to receive kosher meals. After the close of briefing on the appeal, he changed his religious designation again, this time from "Jewish" to "no preference." See Advisory Letter Referencing Mot. to Intervene at 1, *Baranowski* v. *Hart*, No. 05-20646 (5th Cir. June 4, 2007). While the appeal was pending, Texas began developing a policy to provide Jewish inmates with kosher food. *Id.* at 2. Nevertheless, Texas neglected to inform the Fifth Circuit of either of these important developments, and the Fifth Circuit issued a judgment in favor of the State. *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007).

Upon learning of the Fifth Circuit's decision, Aleph Institute and Jewish Prisoner Services International, which both advocate on behalf of Jewish inmates, petitioned to intervene in the case and filed a suggestion of mootness. See Mot. to Intervene, *Baranowski* v. *Hart*, No. 05-20646 (5th Cir. May 21, 2007).[7] But Texas vigorously opposed the suggestion of mootness, arguing that neither the plaintiff's abandonment of Judaism nor Texas's own new kosher food program mooted the case. See Advisory Letter Referencing Mot. to Intervene at 2-3, *Baranowski* v. *Hart*, No. 05-20646 (5th Cir. June 4, 2007). The Fifth Circuit denied the motion to intervene, and the case stands as binding precedent.

While *Baranowski* was pending, another Jewish inmate was pursuing an identical challenge to the denial of kosher food in *Moussazadeh*. There, the plaintiff retained *Amicus* and Latham & Watkins, L.L.P., and the case was stayed while the parties engaged in settlement negotiations. See Order Granting Mot. To Stay, *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, No. 3:07-CV-00574 (S.D. Tex. Apr. 12, 2006). When negotiations broke down, plaintiff's counsel requested a status conference and informed the State that plaintiff would request the stay be lifted. Opening Br. of Plaintiff-Appellant Max Moussazadeh at 11, *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, No. 09-40400 (5th Cir. June 16, 2009). Five minutes before the conference, Texas informed plaintiff's counsel that he would be transferred to a different unit and would be provided kosher food. *Ibid.* It transferred him two days later and was already in

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[7] *Amicus* represented Aleph Institute and Jewish Prisoner Services International.

the process of setting up a kosher kitchen when the *Baranowski* case was decided. *Ibid.*

After the *Baranowski* decision, Texas moved to dismiss *Moussazadeh* as moot, arguing that the plaintiff was now receiving kosher food and would no longer be denied kosher food in the future. *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, 2009 WL 819497, at *7 (S.D. Tex. Mar. 26, 2009). In doing so, it took precisely the opposite position on mootness to the one it took in *Baranowski*. It also moved to dismiss under Rule 12(b)(6), arguing that plaintiff's claim was foreclosed in light of *Baranowski*. See *ibid.* The district court dismissed the case as moot, and the inmate appealed. See *id.* at *9-11.

Shortly before oral argument in the Fifth Circuit, Texas transferred the inmate to a different, non-kosher unit due to a disciplinary infraction. See Supplemental Authorities filed by Appellant, *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, No. 09-40400 (5th Cir. Dec. 22, 2009); Response/Opposition to 28j Letter at 1, *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, No. 09-40400 (5th Cir. Jan. 6, 2010). Texas then admitted that the case was no longer moot, but asked the Fifth Circuit not to rule on the merits, but instead dismiss the appeal and remand to the district court for an analysis under *Baranowski*. *Ibid.* The Fifth Circuit remanded the case for development of the record and rulings on the merits by the district court. *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, 364 F. App'x 110 (5th Cir. 2010).

Through its strategic use of mootness, then, Texas has been able to obtain a valuable precedent against a *pro se* plaintiff in *Baranowski*, while avoiding even

a single deposition in *Moussazadeh* for almost five years. Nor is this an isolated incident in Texas. In this very case, Texas mooted Sossamon's cell restriction claim in the Fifth Circuit by changing its policy on the eve of oral argument. *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d 316, 324-26 (5th Cir. 2009).

A similar case of gamesmanship occurred in *Guzzi* v. *Thompson*, 470 F. Supp. 2d 17 (D. Mass. 2007). There, Massachusetts denied a *pro se* inmate kosher food because he was not certified as Jewish, and the district court ruled in favor of the State. *Id.* at 19-20. On appeal, *Amicus* became involved as an *amicus curiae* arguing the case in lieu of the plaintiff. After oral argument in the First Circuit, the State reversed course and decided to provide kosher food. *Guzzi* v. *Thompson*, 2008 WL 2059321, at *1 (1st Cir. May 14, 2008). It then moved to moot his appeal before any decision could issue. See Notice to the Court Regarding Equitable Relief, *Guzzi* v. *Thompson*, No. 07-1537 (1st Cir. Apr. 18, 2008). The First Circuit agreed, dismissing the appeal as moot and vacating the decision below. *Guzzi*, 2008 WL 2059321, at *1. But as the record shows, it was not until the First Circuit *sua sponte* contacted and appointed *Amicus* to act as *amicus* counsel that the State chose to reverse course and provide an accommodation, rather than litigate the claim to completion.

As these cases illustrate, States often attempt to use mootness to their advantage, litigating to judgment against weaker claims brought by *pro se* inmates, while avoiding stronger claims backed by experienced counsel. This gamesmanship deprives courts of the benefit of "sharply presented issues" with "self-interested parties vigorously advocating opposing positions." *Grant ex rel. Family Eldercare* v.

Gilbert, 324 F.3d 383, 390 (5th Cir. 2003). It also gives States the benefit of favorable precedent obtained in poorly litigated cases, while leaving them free in mooted cases to "resume the complained-of activity without fear of flouting the mandate of a court." *Sossamon*, 560 F.3d at 324. In short, it allows States to pick and choose their opponents.

D. Exceptions to mootness are often ineffective when the defendant is the government.

The typical exceptions to mootness doctrine are often insufficient to prevent States from using mootness to their advantage. Ordinarily, a defendant's voluntary cessation of unlawful conduct does not moot a case unless the defendant bears the "heavy burden" of showing that "the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000).

But courts routinely relax this requirement when the government asserts mootness. As the court below explained, "[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity * * * ." *Sossamon*, 560 F.3d at 325 (citations omitted). This is because "government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith * * * . Without evidence to the contrary, [the court] assume[s] that formally announced changes to official governmental policy are not mere litigation posturing." *Ibid.* Numerous courts

have reached the same conclusion.[8] Thus, when it comes to prisoner litigation, the doctrine of voluntary cessation has proven to be an inadequate check on government gamesmanship.

The same is true of claims that a case is not moot because the government's conduct is "capable of repetition, yet evading review." *Davis* v. *Fed. Election Comm'n*, 128 S. Ct. 2759, 2764 (2008). This exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Ibid.* (internal quotation omitted). Inmates have a particularly difficult time proving that they satisfy this test because their conditions are entirely within the control of the State. States, not inmates, determine whether and how long a person is housed at a particular location or subject to particular policies. Inmates have no way to prove that a particular accommodation is temporary, or that a particular deprivation is likely to recur. See *Moussazadeh*, 2009 WL 819497, at *10 (dismissing

[8] See 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.7 (3d ed. 2008) ("Courts are more apt to trust public officials than private defendants to desist from future violations."). See also *Troiano* v. *Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (stating that "when the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will not recur"); *Mosley* v. *Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (voluntary cessation is treated differently "when the offending parties are government officials rather than private parties"); *Ragsdale* v. *Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) ("[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.").

this concern as "speculative"). Thus, this exception to mootness offers even less protection than does the doctrine of voluntary cessation.

In short, absent nominal damages, States have a powerful incentive to use mootness to their advantage, selectively litigating cases in a way that undermines the protections afforded under RLUIPA. Thus, nominal damages are a crucial piece of the "appropriate relief" puzzle, guaranteeing that States cannot avoid a ruling merely by offering a temporary accommodation on the eve of judgment.

E. RLUIPA's authorization of compensatory and nominal damages is consistent with the purposes underlying Eleventh Amendment immunity.

RLUIPA's narrow authorization of damages not only furthers its own purpose, it is also in keeping with the purpose of the Eleventh Amendment. The Eleventh Amendment exists both to "preven[t] federal-court judgments that must be paid out of a State's treasury," and to "avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996) (quoting *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994); *P. R. Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Allowing a claim for nominal damages against Defendants would not violate either of the state interests protected by the Eleventh Amendment.

The Eleventh Amendment interest in protecting the state fisc is not undermined by RLUIPA because, as discussed above, its operation is almost entirely limited to nominal damages. The Eleventh Amend-

ment is not a blanket exemption from all suits that might affect the state treasury, however remotely. "[R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986); see also *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 440 (2004) (ancillary powers include attorneys' fees, consent decrees, and monetary penalties for failure to follow injunctions). Here, the argument is even stronger because the effect on the treasury would not be "substantial," but negligible.

"Nominal damages are damages in name only." Dan B. Dobbs, *Law of Remedies* § 3.3(2), at 221 (2d ed. 1993). Historically, "[t]he most obvious purpose [of nominal damages] was to obtain a form of declaratory relief in a legal system with no general declaratory judgment act." Douglas Laycock, *Modern American Remedies: Cases and Materials* 561 (3d ed. 2002). Under *Carey*, their purpose is not compensation, but the vindication and preservation of fundamental rights. See 435 U.S. at 266-67.

Nominal damages here are therefore akin to prospective relief, which is available in the face of the Eleventh Amendment because "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). As a remedy targeted at enforcing federal rights, rather than draining the fisc, nominal damages do not trigger the same alarms as compensatory damages. Their purpose is to allow the district court to vindicate federal rights and serve as a predicate for prospective relief should the conduct recur.

The second interest of the Eleventh Amendment—preventing States from "being haled into federal court"—is also not a concern here. *Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico*, 322 F.3d 56, 63 (1st Cir. 2003) (citing *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)). It is undisputed that by accepting federal funds Texas waived its immunity to suits under RLUIPA for "appropriate relief," including declaratory judgments and injunctions. And if the State is willing to be haled into federal court for those types of relief, it adds no indignity to add one dollar of nominal damages.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and conclude that prisoners may sue a State for compensatory and nominal damages under RLUIPA.

Respectfully submitted,

KEVIN J. HASSON
ERIC C. RASSBACH
Counsel of Record
HANNAH C. SMITH
LUKE W. GOODRICH
LORI H. WINDHAM
DIANA M. VERM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K St., NW
Suite 220
Washington, DC 20007
(202) 955-0095

Counsel for Amicus Curiae

APPENDIX

APPENDIX

COMPILATION OF UNITED STATES CODE PROVISIONS INCLUDING THE PHRASE "APPROPRIATE RELIEF"

Without Modification	
11 U.S.C. § 1509	(b)(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court;
15 U.S.C. § 3207	(a)(2) The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene under section 3205 of this title, and such court shall have jurisdiction to grant appropriate relief.
15 U.S.C. § 3601	(a) The Congress finds and declares that * * * (3) * * * in certain situations State governments are unable to provide appropriate relief; * * * appropriate relief from these abuses requires Federal action; * * * (b) The purposes of this chapter are to seek to minimize the adverse impacts of condominium and cooperative conversions particularly on the housing opportunities of low- and moderate-income and elderly and handicapped persons, to assure fair and equitable principles are followed in the establishment of condominium and cooperative opportunities, and to provide appropriate relief where long-term leases of recreation and other cooperative- and condominium-related facilities are determined to be unconscionable.

16 U.S.C. § 824K	(f)(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court.
16 U.S.C. § 2633	(b)(1) The Secretary may bring an action in any appropriate court * * * and such court shall have jurisdiction to grant appropriate relief. (2) If any electric utility or electric consumer * * * and such court shall have jurisdiction to grant appropriate relief. * * * (c)(2) * * * and such court shall have jurisdiction to grant appropriate relief. * * * Any person (including the Secretary) may bring an action * * * in the appropriate court of the United States and such court shall have jurisdiction to grant appropriate relief.
18 U.S.C. § 1531	(c)(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless

	the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.
18 U.S.C. § 3439	Motion to dismiss or for appropriate relief substituted for demurrer or dilatory plea or motion to quash, Rule 12.
21 U.S.C. § 830	(c)(4) Any person who is aggrieved by a disclosure of information in violation of this section may bring a civil action against the violator for appropriate relief.
25 U.S.C. § 954	(c) Reports by guardians; failure or refusal to report; fraudulent, capricious, arbitrary or grossly erroneous reports; prosecution; appropriate relief: If any person or entity required to do so by the Secretary fails or refuses to so report, or, if having reported, the Secretary concludes that any action connected therewith is fraudulent, or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, he may request the Attorney General to cause an action to be brought in the name of the United States in the United States District Court for the Central District of California or in any such district court having jurisdiction over the person, or persons, and subject matter, for such relief as may be appropriate, and said courts are hereby granted jurisdiction to hear and determine such action.
26 U.S.C. § 6015	(e)(1)(A) In general.--In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have

	jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed--
29 U.S.C. § 667	(g) Judicial review of Secretary's withdrawal of approval or rejection of plan; jurisdiction; venue; procedure; appropriate relief; finality of judgment * * * Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision.
29 U.S.C. § 1132	(a) A civil action may be brought-- * * * (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; * * * . (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title; * * * . (9) * * * by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts
29 U.S.C. § 1303	(e)(1) Civil actions may be brought by the corporation for appropriate relief, legal or equitable or both, to enforce (A) the provisions of this subchapter, and (B)

	in the case of a plan which is covered under this subchapter (other than a multiemployer plan) and for which the conditions for imposition of a lien described in section 1083(k)(1)(A) and (B) of this title or section 430(k)(1)(A) and (B) of Title 26 have been met, section 1082 of this title and section 412 of Title 26.
33 U.S.C. § 1415	(a) Assessment of civil penalty by Administrator; remission or mitigation; court action for appropriate relief--Any person who violates any provision of this subchapter, or of the regulations promulgated under this subchapter, or a permit issued under this subchapter shall be liable to a civil penalty of not more than $50,000 for each violation to be assessed by the Administrator. In addition, any person who violates this subchapter or any regulation issued under this subchapter by engaging in activity involving the dumping of medical waste shall be liable for a civil penalty of not more than $125,000 for each violation, to be assessed by the Administrator after written notice and an opportunity for a hearing.
38 U.S.C. § 7104	(d) Each decision of the Board shall include--(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and (2) an order granting appropriate relief or denying relief.

42 U.S.C. § 2000E-8	(c) * * * If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.
42 U.S.C. § 2000E-16C	(b)(1) * * * If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.
42 U.S.C. § 2000CC-2	(c) Cause of action: A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
42 U.S.C. § 2000BB-1	(c) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
42 U.S.C. § 3613	(a)(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court

	not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.
42 U.S.C. § 3614	(b)(1)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under section 3610(g) of this title. * * * (2)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to breach of a conciliation agreement referred to the Attorney General by the Secretary under section 3610(c) of this title. * * * (e) Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (b) of this section which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a

	plaintiff in a civil action under section 3613 of this title.
42 U.S.C. § 5411	(a) * * * Whenever practicable, the Secretary shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views and the failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief.
43 U.S.C. § 1337	(c)(4)(A) Nothing in this subsection shall restrict the power under any other Act or the common law of the Attorney General, the Federal Trade Commission, or any other Federal department or agency to secure information, conduct reviews, make recommendations, or seek appropriate relief.
43 U.S.C. § 1349	(a)(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.
43 U.S.C. § 2011	(c) Jurisdiction of courts: An action under subsection (b) of this section shall

	be barred unless a petition is filed within the time specified. Any such petition shall be filed in the appropriate United States district court. A copy of such petition shall be transmitted by the clerk of such court to the Secretary. Notwithstanding the amount in controversy, such court shall have jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided and to provide appropriate relief.
46 U.S.C. § 2305	(c) The failure to give notice and opportunity to present views under subsection (b) of this section does not preclude the court from granting appropriate relief.
46 U.S.C. § 4311	(e) * * * The failure to give notice and provide the opportunity does not preclude the granting of appropriate relief by the district court.
47 U.S.C. § 543	(a)(5) Revocation of jurisdiction: If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b) of this section, the Commission shall revoke the jurisdiction of such authority.

47 U.S.C. § 546	(e)(2) The court shall grant appropriate relief if the court finds that-- * * * .
49 U.S.C. § 306	(e) When a matter is referred to the Attorney General under subsection (d)(2) of this section, or when the Attorney General has reason to believe that a person is engaged in a pattern or practice violating this section, the Attorney General may begin a civil action in a district court of the United States for appropriate relief.
49 U.S.C. § 5332	(e) Civil actions by Attorney General.-- The Attorney General may bring a civil action for appropriate relief when--(1) a matter is referred to the Attorney General under subsection (d)(2) of this section; or (2) the Attorney General believes a person is engaged in a pattern or practice in violation of this section.
49 U.S.C. § 30163	(b) Prior notice: Failure to give notice and an opportunity to remedy the defect or comply with the applicable motor vehicle safety standard prescribed under this chapter does not prevent a court from granting appropriate relief.
49 U.S.C. § 32308	(d)(3) The failure of the Secretary to comply with paragraph (2) of this subsection does not prevent a court from granting appropriate relief.
49 U.S.C. § 32507	(c)(3) The failure of the Secretary to comply with paragraph (2) of this subsection does not prevent a court from granting appropriate relief.
15 U.S.C. § 3151	(c) Civil action by Attorney General: When a matter is referred to the

	Attorney General pursuant to subsection (b) of this section, or whenever the Attorney General has reason to believe that a recipient is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in the appropriate United States district court for any and all appropriate relief.
49 U.S.C. § 33115	(c)(2)(B) The failure of the Secretary to comply with subparagraph (A) of this paragraph does not prevent a court from granting appropriate relief.
Excluding Damages	
15 U.S.C. § 797	(5) Any person suffering legal wrong because of any act or practice arising out of any violation of subsection (a) of this section may bring a civil action for appropriate relief, including an action for a declaratory judgment or writ of injunction. United States district courts shall have jurisdiction of actions under this paragraph without regard to the amount in controversy. Nothing in this paragraph shall authorize any person to recover damages.
42 U.S.C. § 6395	(e)(1) Any person suffering legal wrong because of any act or practice arising out of any violation of any provision of this chapter described in paragraph (2), may bring an action in an appropriate district court of the United States without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment or writ of

	injunction. Nothing in this subsection shall authorize any person to recover damages.
Including or Including But Not Limited To	
Including Compensatory Damages	
6 U.S.C. § 1142	(5) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.
15 U.S.C. § 2087	(6) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.
49 U.S.C. § 42121	(b)(5) Enforcement of order by Secretary of Labor.--Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United

	States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.
49 U.S.C. § 60129	(b)(5) Enforcement of order by Secretary of labor.--Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief, including, but not to be limited to, injunctive relief and compensatory damages.
Including Compensatory and Exemplary or Punitive Damages	
10 U.S.C. § 2409	(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

42 U.S.C. § 300J-9	(i)(4) Whenever a person has failed to comply with an order issued under paragraph (2)(B), the Secretary shall file a civil action in the United States District Court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.
42 U.S.C. § 7622	(d) Enforcement of order by Secretary: Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.
15 U.S.C. § 2622	(d) Enforcement: Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary shall file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to

	grant all appropriate relief, including injunctive relief and compensatory and exemplary damages.
41 U.S.C. § 265	(c)(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.
42 U.S.C. § 5851	(d) Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.
50 U.S.C. § 2702	(k)(2)(B) In any action brought under subparagraph (A), the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.
18 U.S.C. § 248	(c)(1)(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive

	relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation. * * * (2)(B) In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent * * * . (3)(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).
18 U.S.C. § 2707	(b) Relief.--In a civil action under this section, appropriate relief includes--(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c); and (3) a reasonable attorney's fee and other litigation costs reasonably incurred. (c) Damages.--The court may assess as damages in a civil action under this section the sum of the actual damages

	suffered by the plaintiff * * *. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.
18 U.S.C. § 2252A	(f)(2) Relief.--In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including-- (A) temporary, preliminary, or permanent injunctive relief; (B) compensatory and punitive damages; and (C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.
Including Damages	
18 U.S.C. § 2346	(b)(2) A State, through its attorney general, or a local government, through its chief law enforcement officer (or a designee thereof), may in a civil action under paragraph (1) also obtain any other appropriate relief for violations of this chapter from any person (or by any person controlling such person), including civil penalties, money damages, and injunctive or other equitable relief. Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a

	State or local government, or an Indian tribe.
29 U.S.C. § 1855	(b) Proceedings: In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) of this section and order all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.
18 U.S.C. § 1716E	(1) In general.--A State, through its attorney general, or a local government or Indian tribe that levies an excise tax on tobacco products, through its chief law enforcement officer, may in a civil action in a United States district court obtain appropriate relief with respect to a violation of this section. Appropriate relief includes injunctive and equitable relief and damages equal to the amount of unpaid taxes on tobacco products mailed in violation of this section to addressees in that State, locality, or tribal land.
25 U.S.C. § 450M-1	In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder

	(including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).
Including Compensatory, Statutory and Punitive Damages	
18 U.S.C. § 2520	(b) Relief.--In an action under this section, appropriate relief includes--(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c) and punitive damages in appropriate cases; and (3) a reasonable attorney's fee and other litigation costs reasonably incurred. (c) Computation of damages.--(1) In an action under this section * * * the court shall assess damages as follows: (A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500. (B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not

	more than $1000.
Including Monetary Relief	
42 U.S.C. § 3610	(b)(3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation agreement may award appropriate relief, including monetary relief.
Including Punitive Damages and Civil Penalties	
39 U.S.C. § 3018	(g)(2) Relief.--The court in a civil action under paragraph (1) may award appropriate relief, including a temporary or permanent injunction, civil penalties as determined in accordance with this section, or punitive damages.
49 U.S.C. § 5122	(a) General.--At the request of the Secretary, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed or order, special permit, or approval issued under this chapter. The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed for the Secretary in an administrative case under section 5123.
49 U.S.C. § 60120	(a)(1) Civil actions to enforce this chapter.--At the request of the Secretary of Transportation, the Attorney General may bring a civil action in an appropriate district court of the United States to

	enforce this chapter, including section 60112, or a regulation prescribed or order issued under this chapter. The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties, considering the same factors as prescribed for the Secretary in an administrative case under section 60122.
Damages Included in Separate Subsection	
28 U.S.C. § 1875	(b) Any employer who violates the provisions of this section--(1) shall be liable for damages for any loss of wages or other benefits suffered by an employee by reason of such violation; (2) may be enjoined from further violations of this section and ordered to provide other appropriate relief, including but not limited to the reinstatement of any employee discharged by reason of his jury service; and (3) shall be subject to a civil penalty of not more than $5,000 for each violation as to each employee, and may be ordered to perform community service.
Including Other Forms of Specialized Relief	
47 U.S.C. § 555	(b) The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section and with the provisions of subsection (a) of this section.
11 U.S.C. § 1521	(a) * * * the court may * * * grant any appropriate relief, including—(1) staying the commencement or continuation of an

	individual action or proceeding * * * (2) staying execution against the debtor's assets * * * (3) suspending the right to transfer, encumber or otherwise dispose of any assets * * * (4) providing for the examination of witnesses, the taking of evidence or the delivery of information * * * (5) entrusting the administration or realization of all or part of the debtor's assets * * * to the foreign representative * * * (6) extending relief granted under section 1519(a); and (7) granting any additional relief that may be available to a trustee, except for relief available under [other sections].
29 U.S.C. § 660	(c)(2) * * * In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.
46 U.S.C. § 2114	(b) A seaman discharged or otherwise discriminated against in violation of this section may bring an action in an appropriate district court of the United States. In that action, the court may order any appropriate relief, including-- (1) restraining violations of this section; (2) reinstatement to the seaman's former position with back pay; and (3) an award of costs and reasonable attorney's fees to a prevailing plaintiff not exceeding $1,000; and (4) an award of costs and

	reasonable attorney's fees to a prevailing employer not exceeding $1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith.
19 U.S.C. § 1499	(c)(5)(C) Notwithstanding section 2639 of Title 28, once an action respecting a detention is commenced, unless the Customs Service establishes by a preponderance of the evidence that an admissibility decision has not been reached for good cause, the court shall grant the appropriate relief which may include, but is not limited to, an order to cancel the detention and release the merchandise.
15 U.S.C. § 719i	(c) Upon a request of such officer or agency, * * * the Attorney General may commence a civil action for appropriate relief, including a permanent or temporary injunction or a civil penalty not to exceed $25,000 per day for violations of the compliance order issued under subsection (a) of this section. Any action under this subsection may be brought in any district court of the United States for the district in which the defendant is located, resides, or is doing business, and such court shall have jurisdiction to restrain such violation, require compliance, or impose such penalty or give ancillary relief.
16 U.S.C. § 973i	c) Upon a request by the Secretary, the Attorney General shall commence a civil action for appropriate relief, including

	permanent or temporary injunction, to enforce any order issued by the Secretary under this section.
	(b) Civil actions: The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.
33 U.S.C. § 1319	(f) * * * [T]he Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works * * *. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action

	shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.
33 U.S.C. § 1344	(s)(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton [sic] shall be given immediately to the appropriate State.
33 U.S.C. § 1414b	(g)(3) The Administrator may request the Attorney General to commence a civil action for appropriate relief, including a temporary or permanent injunction and the imposition of civil penalties authorized by subsection (d)(1) of this section, for any violation of subsection (a)(1) of this section or of an order issued by the Administrator under this section.
33 U.S.C. § 1514	(b)(3) Upon a request by the Secretary, the Attorney General shall commence a civil action for appropriate relief, including a permanent or temporary injunction or a civil penalty not to exceed

	$25,000 per day of such violation, for any violation for which the Secretary is authorized to issue a compliance order under paragraph (1) of this subsection.
42 U.S.C. § 300I	(a) * * * The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), including orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment, and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.
42 U.S.C. § 3544	(c)(3)(B) * * * Appropriate relief that may be ordered by such district courts shall include reasonable attorney's fees and other litigation costs.
42 U.S.C. § 6305	(a) If the court finds that the Secretary has failed to comply with a deadline established in section 6295 of this title, the court shall have jurisdiction to order appropriate relief, including relief that will ensure the Secretary's compliance with future deadlines for the same covered product.
42 U.S.C. § 6921	(b)(3)(B)(iv) * * * If such violation extends beyond the thirtieth day after the Administrator's notification, the Administrator may issue an order requiring compliance within a specified time period or the Administrator may

	commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
42 U.S.C. § 6928	(a)(1) * * * the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction. * * * (h)(1) * * * the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.
42 U.S.C. § 6991E	(a)(1) Except as provided in paragraph (2), whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time period or the Administrator may commence a civil action in the United States district court in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
42 U.S.C. § 6992D	(a)(1) Violations: Whenever on the basis of any information the Administrator determines that any person has violated, or is in violation of, any requirement or prohibition in effect under this subchapter (including any requirement or

	prohibition in effect under regulations under this subchapter) (A) the Administrator may issue an order (i) assessing a civil penalty for any past or current violation, (ii) requiring compliance immediately or within a specified time period, or (iii) both, or (B) the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction. Any order issued pursuant to this subsection shall state with reasonable specificity the nature of the violation.
42 U.S.C. § 9152	(b)(1) Upon a request by the Administrator, the Attorney General shall commence a civil action for appropriate relief, including a permanent or temporary injunction, to halt any violation for which the Administrator is authorized to issue a compliance order under subsection (a)(2) of this section.
42 U.S.C. § 14304	(a)(2) * * * [I]n the case of any violation or failure to comply with an order issued under this section, may commence a civil action in the United States district court in the district in which the violation occurred or in the district in which the violator resides for appropriate relief, including a temporary or permanent injunction.
46 U.S.C. § 80507	(c) Enforcement.--The Secretary of Labor may investigate the complaint. If the Secretary of Labor finds there has been a

	violation, the Secretary of Labor may bring a civil action in an appropriate district court of the United States. The court has jurisdiction to restrain violations of subsection (a) and order appropriate relief, including reinstatement of the employee to the employee's former position with back pay.
49 U.S.C. § 13902	(c)(7) Civil actions.--Either the Secretary or the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this subsection or a regulation prescribed or order issued under this subsection. The court may award appropriate relief, including injunctive relief.
50A U.S.C. § 2170	(d)(3) The President may direct the Attorney General of the United States to seek appropriate relief, including divestment relief, in the district courts of the United States, in order to implement and enforce this subsection.
Reference to the Administrative Procedure Act	
15 U.S.C. § 57a	(e)(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter.
15 U.S.C. § 1193	(e)(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the standard or regulation in accordance with chapter 7

	of title 5 and to grant appropriate relief as provided in such chapter. The standard or regulation shall not be affirmed unless the findings required by the first sentence of subsection (b) of this section are supported by substantial evidence on the record taken as a whole. For purposes of this paragraph, the term "record" means the standard or regulation, any notice published with respect to the promulgation of such standard or regulation, the transcript required by subsection (d) of this section of any oral presentation, any written submission of interested parties, and any other information which the Commission considers relevant to such standard or regulation.
15 U.S.C. § 1262	(e)(3)(C) Upon the filing of the petition under this paragraph, the court shall have jurisdiction to review the determination of the Commission in accordance with subparagraphs (A), (B), (C), and (D), of paragraph (2) of the second sentence of section 706 of title 5. If the court ordered additional evidence to be taken under subparagraph (B) of this paragraph, the court shall also review the Secretary's determination to determine if, on the basis of the entire record before the court pursuant to subparagraphs (A) and (B) of this paragraph, it is supported by substantial evidence. If the court finds the determination is not so supported, the

	court may set it aside. With respect to any determination reviewed under this paragraph, the court may grant appropriate relief pending conclusion of the review proceedings, as provided in section 705 of title 5.
15 U.S.C. § 1474	(b)(4) With respect to any standard reviewed under this subsection, the court may grant appropriate relief pending conclusion of the review proceedings, as provided in section 705 of such title 5.
42 U.S.C. § 2022	(c)(2) * * * The court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter.
42 U.S.C. § 5405	(a)(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the order in accordance with the provisions of sections 701 through 706 of Title 5, and to grant appropriate relief.
42 U.S.C. § 6306	(b)(2) Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter. No rule under section 6293, 6294, or 6295 of this title may be affirmed unless supported by substantial evidence.
42 U.S.C. § 7525	(b)(2)(B)(iv) Upon the filing of the petition referred to in clause (ii), the court shall have jurisdiction to review the

	order in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter.
42 U.S.C. § 8412	(c)(2) Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule, order, or denial in accordance with chapter 7 of Title 5, and to grant appropriate relief as provided in such chapter. No rule or order (or denial thereof) may be affirmed unless supported by substantial evidence.
49 U.S.C. § 31141	(f)(2) The court has jurisdiction to review the decision, grant, or denial and to grant appropriate relief, including interim relief, as provided in chapter 7 of title 5.
29 U.S.C. § 727	(3)(A)In general: Upon the filing of a petition under paragraph (1) for judicial review of a determination, the court shall have jurisdiction--(i) to grant appropriate relief as provided in chapter 7 of Title 5 [5 U.S.C.A. § 701 et seq.] except for interim relief with respect to a determination under subsection (c) of this section; and
15 U.S.C. § 2060	(c) Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter. * * * (g)(3) Upon the filing of the petition under paragraph (2) of this subsection, the court shall have

	jurisdiction to review the rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter.
15 U.S.C. § 2618	(c)(1)(A) Upon the filing of a petition under subsection (a)(1) of this section for judicial review of a rule, the court shall have jurisdiction (i) to grant appropriate relief, including interim relief, as provided in chapter 7 of Title 5 and (ii) except as otherwise provided in subparagraph (B), to review such rule in accordance with chapter 7 of Title 5.
21 U.S.C. § 360G	(c)Upon the filing of the petition under subsection (a) of this section for judicial review of a regulation or order, the court shall have jurisdiction to review the regulation or order in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter.
21 U.S.C. § 360KK	(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the regulation in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter.
21 U.S.C. § 387L	Upon the filing of the petition under subsection (a) for judicial review of a regulation or order, the court shall have jurisdiction to review the regulation or order in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided for

	in such chapter. A regulation or denial described in subsection (a) shall be reviewed in accordance with section 706(2)(A) of Title 5.
Or Other Appropriate Relief	
Injunctive, Declaratory, or Other Appropriate Relief	
2 U.S.C. § 437D	(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g (a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;
Damages or Secure an Accounting or Other Appropriate Relief	
29 U.S.C. § 501	(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization

Damages or Other Appropriate Relief	
33 U.S.C. § 2732	(d)(7)No Council shall be held liable under State or Federal law for costs or damages as a result of rendering advice under this section. Nor shall any advice given by a voting member of a Council, or program representative or agent, be grounds for estopping the interests represented by the voting Council members from seeking damages or other appropriate relief.
Other Forms of Specialized Relief or Other Appropriate Relief	
22 U.S.C. § 6303	The Attorney General may bring an action in an appropriate district court of the United States for injunctive and other appropriate relief with respect to-- (1) any violation of subsection (b) of this section; or (2) any order issued pursuant to subsection (e) of this section.
33 U.S.C. § 2236	(b)(3) On petition of the Attorney General or any other party, that district court may--(A) grant appropriate injunctive relief to restrain an action by that non-Federal interest violating the conditions of consent in subsection (a) of this section; (B) order the refund of any port or harbor dues not lawfully collected, and (C) grant other appropriate relief or remedy.
42 U.S.C. § 1320A-7A	(k) Whenever the Secretary has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject

	to a civil monetary penalty under this section, the Secretary may bring an action in an appropriate district court of the United States (or, if applicable, a United States court of any territory) to enjoin such activity, or to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty if any such penalty were to be imposed or to seek other appropriate relief.
42 U.S.C. § 1320A-8	(h) Injunction: Whenever the Commissioner of Social Security has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty under this section, the Commissioner of Social Security may bring an action in an appropriate district court of the United States (or, if applicable, a United States court of any territory) to enjoin such activity, or to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty and assessment if any such penalty were to be imposed or to seek other appropriate relief.
50A U.S.C. § 2409	(j)(3) If, within 20 days after a petition is filed under paragraph (2), the processing of the application has not been brought into conformity with the requirements of this section, or the application has been

	brought into conformity with such requirements but the Secretary has not so notified the applicant, the applicant may bring an action in an appropriate United States district court for a restraining order, a temporary or permanent injunction, or other appropriate relief, to require compliance with the requirements of this section. The United States district courts shall have jurisdiction to provide such relief, as appropriate.
28 U.S.C. § 596	(a)(3) Judicial review of removal.--An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia. A member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.
29 U.S.C. § 659	(c) * * * The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance.
29 U.S.C. § 794A	(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections

	706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.
30 U.S.C. § 815	(c)(2) * * * If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming,

	modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance.
42 U.S.C. § 1437D	(q)(7) Any applicant for, or tenant of, covered housing assistance affected by (A) a negligent or knowing disclosure of information referred to in this subsection about such person by an officer, employee, or authorized representative of any public housing agency, which disclosure is not authorized by this subsection, or (B) any other negligent or knowing action that is inconsistent with this subsection, may bring a civil action for damages and such other relief as may be appropriate against any public housing agency responsible for such unauthorized action. The district court of the United States in the district in which the affected applicant or tenant resides, in which such unauthorized action occurred, or in which the officer, employee, or representative alleged to be responsible for any such unauthorized action resides, shall have jurisdiction in such matters. Appropriate relief that may be ordered by such district courts shall include reasonable attorney's fees and other litigation costs.
42 U.S.C. § 7193	(c) * * * The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's remedial order, or directing other appropriate relief, and such order

	shall, for the purpose of judicial review, constitute a final agency action, except that enforcement and other judicial review of such action shall be the responsibility of the Secretary.
42 U.S.C. § 7413	(b) * * * Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. * * *.
42 U.S.C. § 7545	(d)(2) The district courts of the United States shall have jurisdiction to restrain violations of subsections (a), (f), (g), (k), (l), (m), (n), and (o) of this section and of the regulations prescribed under subsections (c), (h), (i), (k), (l), (m), (n), and (o) of this section, to award other appropriate relief, and to compel the furnishing of information and the conduct of tests required by the Administrator under subsection (b) of this section.
45 U.S.C. § 231N	(j)(5)(F)The Railroad Retirement Board may bring a civil action-- * * * (ii) to

	obtain other appropriate relief to redress such violations, or to enforce any provisions of this subchapter.
45 U.S.C. § 823	(i) The Attorney General shall commence a civil action in an appropriate Federal court to enjoin any activity which the Secretary finds is in violation of this subchapter, regulations issued hereunder, or any conditions which were duly agreed to, and to secure any other appropriate relief.
47 U.S.C. § 1104	(l) The Administrator shall commence a civil action in a court of appropriate jurisdiction to enjoin any activity which the Board finds is in violation of this chapter, the regulations under this chapter, or any conditions which were duly agreed to, and to secure any other appropriate relief, including relief against any affiliate of the applicant.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CHRISTIAN LEGAL SOCIETY AND PRISON FELLOWSHIP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Kimberlee Wood Colby
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, VA 22151
(703) 894-1087

Pat Nolan
PRISON FELLOWSHIP
44180 Riverside Parkway
Lansdowne, VA 20176
(703) 554-8569

James K. Lehman
Counsel of Record
William C. Wood, Jr.
Jay T. Thompson
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street
Columbia, SC 29201
Jim.Lehman@nelsonmullins.com
(803) 799-2000

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INTEREST OF *AMICI CURIAE*[1]

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. CLS's legal advocacy and information division, the Center for Law and Religious Freedom, works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center for Law and Religious Freedom strives to preserve religious freedom in order that men and women might be free to do God's will and because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

In the wake of the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), CLS played a leading role in a coalition formed to draft and support new religious freedom legislation. *See Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 225–313

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[1] The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

(2000) (statement of Steven T. McFarland, Director, Center for Law and Religious Freedom, Christian Legal Society). That effort led to the adoption of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.* ("RLUIPA"), which is at issue in this case. Since RLUIPA was enacted, CLS has consistently participated in the defense of RLUIPA's constitutionality in multiple forums, including in this Court in the case of *Cutter v. Wilkinson*, 544 U.S. 709 (2005), which rejected an Establishment Clause challenge to section 3 of RLUIPA.

This Court's determination as to whether an individual may sue a State or a State official in his official capacity for damages for violations of RLUIPA has significant implications for the breadth and scope of the protections guaranteed to fundamental liberties. This Court's determination will affect the ability of religious assemblies and institutions, persons owning or occupying property used for religious exercise, and institutionalized persons throughout the United States to seek judicial recourse when a State unlawfully imposes a substantial burden on religious exercise in violation of RLUIPA.

Prison Fellowship (PF) is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Founded 30 years ago by Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes, PF carries out its mission both in service to Jesus Christ and in contribution to restoring peace

to our communities endangered by crime. Among other things, PF: (i) provides in-prison seminars and special events that expose prisoners to the Gospel, teach biblical values and their application, and develop leadership qualities and life skills; (ii) develops mentoring relationships that help prisoners mature through coaching and accountability; and (iii) supports released prisoners in a successful restoration to their families and society. As founder Chuck Colson has explained, "God has given us a vision and a ministry to go to the last, the least, and the lost of our society and bring hope to them." *Foundations for Life: Prison Fellowship Annual Report 2004-2005.*

PF thus has a strong interest in the correct application of laws such as RLUIPA. Religion has an unmistakable influence on prisoners' lives because it motivates them to make good choices that benefit themselves and our communities, bringing greater peace and security. Allowing an individual to sue the State or a State official for damages for violations of RLUIPA appropriately recognizes the harm of not only contravening a fundamental right to exercise religion but also the harm of cutting inmates off from the resources and relationships they need to transform their lives.

SUMMARY OF ARGUMENT

As Spending Clause legislation, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") unambiguously allows an individual to assert a claim for appropriate relief against a State or State official in his official capacity. A plain reading of RLUIPA indicates that a State knowingly waives its sovereign immunity to suits for monetary damages by accepting federal funds under the statute. Case law and statutes in effect at the time Congress enacted RLUIPA put the States on notice that prisoners and others affected by a violation of their fundamental right to religious exercise as protected by RLUIPA could bring suit under the statute for monetary damages, among other appropriate remedies. A State's interest in sovereign immunity does not authorize the State to violate a statutorily-protected fundamental right without being subject to monetary damages.

The practical effect of holding that individuals may not recover damages under RLUIPA would be crippling to the intent of the statute and legitimate efforts to remedy violations of RLUIPA. Allowing the phrase "appropriate relief" to include only prospective relief would, for many individuals, create a right without a remedy, as injunctions and declaratory relief would not adequately deter future RLUIPA violations and would come too late for individual rights to be sufficiently vindicated.

Nor does the Prison Litigation Reform Act ("PLRA") serve as an independent bar to the Petitoner's RLUIPA claim for damages. A plain reading of the PLRA shows that it does not limit damages exclusively to suits for physical injury and

does not bar either damages claims for State violations of fundamental rights or claims for nominal damages.

ARGUMENT

I. RLUIPA ALLOWS SUIT FOR MONETARY DAMAGES AGAINST A STATE OR STATE OFFICIAL IN HIS OFFICIAL CAPACITY.

Congress passed the RLUIPA pursuant to its Spending Power. U.S. Const. art. I, § 8, cl. 1; *Cutter v. Wilkinson*, 544 U.S. 709 (2005). RLUIPA establishes statutory protection of religious exercise, which is a First Amendment fundamental right, and states that "[a] person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a) ("RLUIPA Remedial Provision").

This Court has "required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). RLUIPA unambiguously informs the States that a claim for "appropriate relief" includes a suit for monetary damages. This is supported by:

- A plain reading of RLUIPA as a whole;
- Relevant case law and statutes in effect at the time RLUIPA was enacted;
- The legislative history of RLUIPA; and
- The fact that RLUIPA was fashioned to provide a statutory remedy for State infringement of fundamental constitutional rights.

For each of these reasons, RLUIPA enables a State to exercise its choice to accept federal funds knowingly, cognizant of the possibility of monetary damages for violating RLUIPA.

A. RLUIPA Unambiguously Allows for Monetary Damages Against a State or State Official in His Official Capacity.

A State's waiver of sovereign immunity need not include a specific enumeration of remedies to which the State consents to suit. RLUIPA unambiguously conditions a State's receipt of federal funds upon submission to "a judicial proceeding" for violations of the Act. 42 U.S.C. § 2000cc-2(a). At that proceeding, the Act allows an aggrieved person, with no expressed limitation, to assert a claim for any "appropriate relief" against the State. *Id.* Therefore, a State exercises its choice to accept federal funds knowingly, cognizant of the possibility of monetary damages for violating RLUIPA.

1. *The Text of RLUIPA Indicates that a State Knowingly Waives its Sovereign Immunity to Suits for Monetary Damages Relief.*

The text of RLUIPA unambiguously informs a State that "[a] person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* The statute also is clear that the term "government" includes a State or State official—in this case, Texas. *Id.* § 2000cc-5(4).

In its own rules of construction, RLUIPA mandates that courts and the States construe these provisions "in favor of a broad protection of religious

exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[2] 42 U.S.C. § 2000cc-3(g). Congress felt so strongly about this that it did not even leave it to the general rule that remedial statues are to be interpreted broadly, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), but reinforced this well established rule of statutory interpretation with an express statement in the statutory text.

Because the phrase "appropriate relief" cannot be interpreted in a vacuum, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and because RLUIPA requires that it be "construed in favor of broad protection," if a question arises as to interpretation of the RLUIPA Remedial Provision, the Court must construe this provision broadly to the maximum extent permitted by the Constitution.[3]

Reading "appropriate relief" to include monetary relief is entirely consistent with this Court's Spending Power jurisprudence. Thus, a statute passed under Congress's Spending Power may authorize monetary damages against a State or

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[2] When Congress includes instructions such as these, this Court has regularly relied on them. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497–98 (1985) (employing the rule of interpretation set forth in RICO that the statute is to "be liberally construed to effectuate its remedial purposes").

[3] The idea that this provision requires broad interpretation of RLUIPA is not a novel one; as Judge Kozinski of the Ninth Circuit recently observed, "[i]t seems to me that when Congress goes to the trouble of telling us how to construe a statute, and uses such phrases as 'broad protection' and 'the maximum extent permitted,' we need to pay close attention and do as Congress commands." *Khatib v. County of Orange*, 603 F.3d 713, 718–19 (9th Cir. 2010) (Kozinski, J., dissenting).

State official. *See Sabri v. United States*, 541 U.S. 600, 605 (2004) (Congress has authority to impose liability for violations of Spending Clause legislation); *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999) (Congress may use Spending Clause legislation to "extract" waivers of state sovereign immunity); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992) (finding damages remedies generally available to enforce Spending Clause legislation). Contrary to the Respondents' argument at the petition stage and the Fifth Circuit's conclusion, the simple terms Congress used in RLUIPA to designate available remedies point to no limitation. Nothing in the common meaning of "appropriate" signifies a limitation in terms of monetary versus non-monetary relief. Rather, the term simply points to the determination that its object--in this case "relief"—should be "suitable" or "fit." *See, e.g., Webster's New World College Dictionary* 69 (4th ed. 2005) (defining "appropriate" as "right for the purpose; suitable; fit; proper").

RLUIPA includes no qualifying language to provide any limitations on the type of relief that may be awarded other than its appropriateness under the specific facts of a particular case. By contrast, when Congress has intended to restrict the types of "appropriate relief" available, it has expressly done so. In § 502(a)(3) of ERISA, Congress used the phrase "appropriate *equitable* relief" to describe one remedy for violation of certain of its provisions. 29 U.S.C. § 1132(a)(3) (emphasis added). This Court has interpreted the ERISA provision to mean what it says—"'[e]quitable' relief must mean *something* less than *all* relief," *Mertens v. Hewitt Assocs.*, 508 U.S.

248, 258 n.8 (1993) (emphasis in original) —and when Congress intends to provide anything less than all relief, it says so. There is no ambiguity here. *See, e.g., Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 361–63 (2006) ("appropriate equitable relief" under § 502(a)(3) does not include damages, does include constructive trust or equitable lien). Conversely, where, as here, Congress includes no qualifier of the type of remedy for which a State waives immunity, "*all* relief" that is otherwise appropriate is available, including monetary damages. *Mertens*, 508 U.S. at 258 n.8.

Importantly, the language of RLUIPA is markedly distinguishable from the text of any statute this Court has held to be ambiguous, equivocal, or insufficient to constitute a State's waiver of sovereign immunity and a consequent unavailability of monetary relief. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974), *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Welch v. Tex. Dep't of Highways*, 483 U.S. 468 (1987).

In *Edelman*, this Court recognized a distinction between prospective relief and retroactive relief, allowing prospective injunctive relief against State officials but barring retroactive relief that would have required a State to disgorge funds from the State treasury where the funds were improperly accumulated in the State's administration of a federal program under the Social Security Act. 415 U.S. at 672–73. Addressing whether a State could "constructively consent" to be sued in federal court notwithstanding its Eleventh Amendment protection, the Court held that monetary damages were not available because, unlike RLUIPA, the Social Security Act did not specifically authorize suit

against the State. *Id.* However, the distinction allowing injunctive relief but not retroactive relief arose not from a specific waiver of immunity or consent to suit—there was none in *Edelman*, unlike in this case—but from the limited exception to Eleventh Amendment immunity established in *Ex Parte Young*, 209 U.S. 123 (1908) (prospective injunctive relief available against state officials in their official capacity).

The Court reached the same conclusion in *Atascadero* (no monetary damages because the Rehabilitation Act of 1973 did not specifically authorize suite against a State) and *Welch* (same under the Jones Act).

Edelman, *Atascadero*, and *Welch* each focused on the specific text of the statute at issue, requiring unequivocal expression that a State was subject to suit and thus knowingly waived its sovereign immunity. However, these cases did not suggest that a State will waive immunity to specific remedies only when a statute specifies each available remedy. The immunity waived when a State consents to suit under Spending Clause legislation is immunity from suit, not immunity from specific types of remedies. *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002).[4]

RLUIPA contains the type of unambiguous language contemplated in *Edelman*, *Atascadero* and *Welch* whereby a State waives its sovereign

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[4] Likewise, the relief sought by a plaintiff is not determinative of whether a State may assert sovereign immunity as a defense. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

immunity, including monetary damages, "'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Atascadero*, 473 U.S. at 237 (quoting *Edelman*, 415 U.S. at 673). Unlike the statutes at issue in those cases, RLUIPA unambiguously authorizes an individual to sue a State or a state official in his official capacity. *See* 42 U.S.C. § 2000cc-2(a) (allowing suit against "a government"); § 2000cc-5(4) (defining "government" to include, among other things, a State or State official). Instead of a specific enumeration of every available remedy, which would be impractical and contrary to typical legislative drafting, the unqualified phrase "appropriate relief" sets forth the scope of recoverable awards. The language of RLUIPA enables a State to exercise its choice of accepting federal funds knowingly, cognizant that it includes monetary damages, *because* the language is broad and specifies that it must be construed to include all available protections of religious exercise, not in spite of its being broad.

Further, Congress expressly *excluded* monetary damages in a separate section of RLUIPA that grants the United States authority to enforce the provisions of the Act by "an action for injunctive relief," rather than by an action for "appropriate relief." 42 U.S.C. § 2000cc-2(f). This contrast demonstrates Congress's intent that the phrase "appropriate relief" should encompass remedies above and beyond injunctions. *See Timbers of Inwood Forest Assoc.*, 484 U.S. at 371 ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme —

because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . ." (citations omitted)).

This is not an instance of general statutory language susceptible to more than one meaning. To hold that RLUIPA allows monetary damages against a State would not authorize a plaintiff to seek monetary damages against a State in instances where the statutory text is ambiguous or equivocal. To the contrary, accepting the argument that a State was not knowingly cognizant that the broad phrase "appropriate relief" included damages would be tantamount to viewing the State as a dull-witted entity incapable of making informed funding decisions. Cases evaluating the States in this and similar contexts require Congress to treat the States as fellow adults and to speak plainly to them; they do not treat the States as children who do not understand language or who are unknowledgeable about what is going on around them. *See Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 596 (1983) (noting that States or other federal funding recipients are presumed to have "weighed the benefits and burdens before accepting the funds"); *United States v. New Jersey*, 194 F.3d 426, 433 (3d Cir. 1999) (in the context of a contractual relationship between the federal government and a State, "the State is a sophisticated litigant").

2. *Relevant Case Law and Statutes in Effect at the Time Congress Enacted RLUIPA Demonstrate that a State Accepting Federal Funds Under RLUIPA had Clear, Unambiguous Notice that the Phrase "Appropriate Relief" Included Damages.*

This Court has stated that, "in determining Congress's intent to limit application of the traditional presumption of all appropriate relief [including monetary damages], we evaluate the state of the law when the Legislature passed [the statute in question]." *Franklin*, 503 U.S. at 71 (citation omitted); *see also Fitzgerald v. Barnstable Sch. Comm.*, --- U.S. ---, 129 S.Ct. 788, 797 (2009) ("[W]e presume Congress was aware of [the law at the time the statute was put into effect] when it passed Title IX.") (citation omitted). Therefore, the plain reading of the text is reinforced by: (a) this Court's relevant jurisprudence at the time Congress enacted RLUIPA, and (b) the interpretation of similar statutes Congress had created at the time it enacted RLUIPA.[5] These resources indicate that RLUIPA permits recovery of monetary damages against a State.

a. Prior Case Law

In drafting the RLUIPA Remedial Provision, Congress used language identical to that used by this Court in *Franklin*, when it held that plaintiffs could be awarded retroactive relief (damages) under the implied right of action in Title IX in accordance

[5] This limits the inquiry on this point, at the latest, to authorities issued on or before September 22, 2000, the date President Clinton signed RLUIPA into law.

with "the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order *any appropriate relief*." 503 U.S. at 69 (emphasis added) (citing *Davis v. Passman*, 442 U.S. 228, 247 n.26 (1979)). "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award *any appropriate relief* [including damages] in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70–71 (emphasis added). *See also Barnes v. Gorman*, 536 U.S. 181, 189 (2002). "That a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment.'" *Franklin*, 503 U.S. at 68 (quoting *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). Thus, existing precedent at the time of RLUIPA's enactment pointed States to two conclusions regarding the phrase "appropriate relief." First, to the extent a State thought the phrase unspecific on allowable remedies, it knew that such lack of specificity permitted the courts to award any relief, including monetary damages. Second, "appropriate relief" includes monetary damages as specified and awarded in *Franklin*.

Additionally, a Spending Clause statute's "contractual nature has implications for [this Court's] construction of the scope of available remedies." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). "One of these implications, we believe, is that a remedy is 'appropriate relief,' only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability

of that nature." *Barnes*, 536 U.S. at 187 (quoting *Franklin*, 503 U.S. at 73). "A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, *but also to those remedies traditionally available in suits for breach of contract*." *Id.* at 187 (emphasis added). "When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure." *Id.* at 189 (citing *Guardians Ass'n*, 463 U.S. at 633 (Marshall, J., dissenting)).

Based on these principles, and under this Court's well-settled Spending Clause analysis, "a recipient of federal funds is . . . subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187 (internal quotation marks omitted). More importantly, however, this analysis demonstrates that the phrase "appropriate relief" unambiguously gave notice to the States that, in accepting federal funds, a State waives its immunity to suits for relief traditionally available in suits for breach of contract, including monetary damages.

b. Prior Statutes

The RLUIPA Remedial Provision closely parallels the remedial section of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination by certain Government agencies and departments and grants "the Civil Service

Commission . . . authority to enforce [that prohibition against those agencies] through *appropriate remedies*." 42 U.S.C. § 2000e-16(b) (emphasis added). In 1999, just prior to Congress's enactment of RLUIPA, this Court held that the phrase "appropriate remedies" was an unequivocal waiver of the federal government's sovereign immunity and granted the Equal Employment Opportunity Commission authority to award aggrieved parties compensatory damages against the applicable Government agencies. *West v. Gibson*, 527 U.S. 212, 222–23 (1999).

The language Congress chose to form the RLUIPA Remedial Provision also mirrors verbatim the language in the remedial provision of the Religious Freedom Restoration Act ("RFRA"). *Compare* 42 U.S.C. § 2000cc-2(a) ("A person may assert a violation of this chapter *as a claim or defense in a judicial proceeding and obtain appropriate relief against a government*." (emphasis added)) *with* 42 U.S.C. § 2000bb-1(b) ("A person whose religious exercise has been burdened in violation of this section may assert that violation *as a claim or defense in a judicial proceeding and obtain appropriate relief against a government*." (emphasis added)).[6]

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[6] In their normal usage, the phrases "claim" and "appropriate relief" generally include monetary relief. For example, the Tucker Act, 28 U.S.C. § 1491(a)(1), confers jurisdiction on the United States Court of Appeals of Federal Claims over "any claim" arising under the Contract Disputes Act of 1978 ("CDA"). The CDA applies to "all claims by a contractor against the government relating to a contract." 41 U.S.C. § 602(a). Federal regulations specifically define claim as a written demand seeking "the payment of *money* in a sum certain, . . . *or other relief* arising under or relating to the

Presuming, as this Court must, that Congress was fully aware that the phrase "appropriate relief" in RLUIPA mirrored the language of these other statutes used in similar contexts, *Franklin*, 503 U.S. at 71, the Court should conclude that Congress unambiguously intended RLUIPA to include relief for monetary damages. Had Congress been unhappy with the Court's prior interpretation of "appropriate relief" or "appropriate remedies," it could have easily altered the language in the RLUIPA Remedial Provision to expressly exclude monetary damages.

3. *A State is on Notice of the Court's Prior Holdings When it Subjects Itself to Suits for "Appropriate Relief" Under RLUIPA.*

When RLUIPA was enacted in September 2000, Congress used the term "appropriate relief" with knowledge that this Court had interpreted this phrase in *Franklin*, 503 U.S. at 68-71, (and other cases set forth above) to include monetary damages. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991)

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contract." 48 C.F.R. § 2.101 (emphasis added). Moreover, the Tucker Act also grants jurisdiction to courts in bid procurement actions to "award *any relief* that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2) (emphasis added). As these statutes indicate, Congress assumed the normal usage of "claim" and "any relief" would include monetary relief, and in certain instances took additional steps to limit the monetary relief that was otherwise contemplated by the words "claim" and "any relief."

(Congress legislates with knowledge of basic rules of statutory construction).

The highest court of the State of Texas has interpreted its own laws using this same rule of construction. *See, e.g.*, *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) ("Presumptively, the Legislature was aware of [an earlier] opinion when it enacted [the statute there at issue] in 1995."); *accord Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999) (presumed knowledge of common law). Like it does with Congress, then, this Court may presume that the Texas Legislature knew the prior law of *Franklin* (and the body of law interpreting the phrase "appropriate relief") when it accepted federal funds and waived its sovereign immunity pursuant to RLUIPA's terms. *Cf. Guardians Ass'n*, 463 U.S. at 596 (noting that States are presumed to have "weighed the benefits and burdens before accepting the funds"). This body of law indicates that "appropriate relief" includes a host of remedies, including monetary damages.

4. *The Legislative History of RLUIPA Shows that Congress Intended, and the States Knew, that Aggrieved Persons Would Be Able to Recover Damages.*

The legislative history of RLUIPA also clearly indicates that Congress intended "appropriate relief" for RLUIPA violations to include monetary damages. Indeed, the day before RLUIPA was signed into law, RLUIPA's primary sponsor specifically noted on the Congressional Record that RLUIPA creates "a private cause of action for *damages*, injunction, and declaratory judgment." 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (emphasis added) (statement of

Hon. Charles T. Canady); *see also* H.R. Rep. No. 106-219, at 29 (1999) (providing an identical analysis of section 4(a) of the Religious Liberty Protection Act of 1999, the predecessor to RLUIPA).[7]

Similarly, prior to RLUIPA's enactment, the author of a leading casebook on remedies[8] presented testimony to the House Subcommittee on the Constitution and the Senate Judiciary Committee indicating that the remedies section of RLUIPA should be read so that "appropriate relief includes declaratory judgments, injunctions and damages." *See Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (May 12, 1999) (statement of Douglas Laycock, Professor, University of Texas Law School discussing section 4(a) of Religious Liberty Protection Act, the predecessor to RLUIPA); *see also Issues Relating to Religious Liberty Protection, And Focusing on the Constitutionality of a Religious Protection Measure, Hearing Before the Committee on the Judiciary of the United States Senate*, 106th Cong. 91 (1999) (same); *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 219 (1998) (same).

RLUIPA's legislative history further indicates that Congress intentionally used the phrase

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[7] The Religious Liberty Protection Act was the precursor to what eventually became RLUIPA. *See* 146 Cong. Rec. E1563 (Sept. 22, 2000) (statement of Hon. Charles T. Canady) ("[RLUIPA] is patterned after an earlier, more expansive bill, H.R. 1691 . . . .").

[8] *See* Douglas Laycock, *Modern American Remedies: Cases and Materials* (3d ed. 2002).

"appropriate relief" to provide for a broad scope of remedies and avoid unnecessarily limiting the scope of relief under the statute. Therefore, Congress drafted RLUIPA with specific "accordion-like provision[s]" which "leave[] it to the Court to decide what kind of relief can appropriately be obtained against a particular government being sued." *Issues Relating to Religious Liberty Protection, And Focusing on the Constitutionality of a Religious Protection Measure, Hearing Before the Committee on the Judiciary of the United States Senate*, 106th Cong. 122, 125 (1999) (statement of Gene C. Schaerr, Sidley & Austin). Congress included these "accordion-like provisions" so that trial courts and fact finders could determine what relief would be "appropriate" depending on the facts and circumstances of each case. Therefore, RLUIPA demonstrates Congress's efforts to ensure that relief for RLUIPA violations would be appropriately tailored under the circumstances, to include declaratory judgments, injunctions, and, when appropriate, monetary damages.

B. A State's Interest in Sovereign Immunity Does not Authorize the State to Violate an Individual's Fundamental Right to Religious Exercise as Protected by RLUIPA Without Being Subject to Monetary Damages.

Congress enacted RLUIPA to protect individual religious liberties. *See* 42 U.S.C. § 2000cc(a)(1) ("No government shall impose . . . a substantial burden on the religious exercise of a person . . . ."); 42 U.S.C. § 2000cc-1(a) (same); *see also* 146 Cong. Rec. E1563 (Sept. 22, 2000) (statement of Hon. Charles T. Canady) (stating RLUIPA was designed to "protect

the free exercise of religion from unnecessary governmental interference").

Sovereign immunity, while an important principle generally, is a thin veil for a State's violation of an individual fundamental right, especially when the State has accepted federal funds on the statutory condition that it will be liable for all appropriate relief if it violates this fundamental right without a compelling governmental interest in the least restrictive means. See 42 U.S.C. § 2000cc-1(a). In this regard, the interest of a State does not trump an individual's fundamental rights.

A State's sovereign immunity under a federal statute is an issue of federalism insofar as it involves whether federal law may impose monetary damages against a State. However, in the debate of federal and State powers, the interest of the individual whose fundamental right has been violated is a greater concern than whether a federal statute may allow monetary damages against a State. From the founding of this nation, an underlying principle of the federal structure has been that the interests of the people are superior to those of both the federal and state governments. James Madison wrote:

> Notwithstanding the different modes in which they are appointed, we must consider both [the federal government and the state governments] as substantially dependent on the great body of the citizens of the United States. . . . The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The

> adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .

The Federalist No. 46 (James Madison). As the founding fathers intended, the federal and State governments have a "common superior" in the people. Therefore, in the debate over whether a federal statute that protects an individual's fundamental right may allow for monetary damages against a State, the greatest concern must be redress for the individual right, not the interest of the State.

In this case, this principle manifests itself in the context of waiver of sovereign immunity when a State consents to suit under Spending Clause legislation. Similarly, in the distinct but related context of Congressional abrogation of sovereign immunity under Section 5 of the Fourteenth Amendment, this Court has denied a sovereign immunity defense against monetary damages in cases involving statutes that protect fundamental rights or suspect classes. *Compare Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–69 (2001) (plaintiffs could not recover damages from State under Title I of Americans with Disabilities Act ("ADA") where no fundamental right or protected

class was involved) *with Tennessee v. Lane*, 541 U.S. 509, 522–34 (2004) (plaintiffs could recover damages from State under Title II of the ADA because Title II protected the fundamental right of access to the courts and "Congress enacted Title II against a backdrop of . . . systematic deprivations of fundamental rights"); *see also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) (state employee could recover damages from State for violations of Family and Medical Leave Act that redressed State's unconstitutional sex discrimination).

The Court reconciled the various positions on this issue in *United States v. Georgia*, 546 U.S. 151, 159 (2006). Acknowledging disagreement among the Members of the Court as to the scope of Congress's powers under the Fourteenth Amendment, the Court stated that "no one doubts" that Congress's power under the Fourteenth Amendment includes the power to abrogate a State's sovereign immunity by creating "a private cause of action for damages against the States" for conduct that "independently violated" the Fourteenth Amendment. *Id.* at 158–59. Therefore, whether a statute can allow monetary damages against a State in the Fourteenth Amendment context turns on whether the statute provides redress for conduct that independently violates the Fourteenth Amendment. This most often arises in the context of individual fundamental rights and suspect classes that invoke strict scrutiny.

In the same way, Congress may allow monetary damages against a State in a Spending Clause statute that provides redress for conduct that independently violates an individual's fundamental

rights. The concept of a fundamental right is not strictly a Fourteenth Amendment concept. A fundamental right is one so essential to individual liberty that it is said to be "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted). Such fundamental rights underlay the fabric of the Constitution and are recognized in all contexts, including the Spending Clause and associated analyses of sovereign immunity and the Eleventh Amendment. Therefore, the test for whether a State has waived sovereign immunity by accepting federal funds under a Spending Clause statute should not be applied in a vacuum. When a statute enacted under the Spending Clause creates a cause of action against a State to protect religious exercise, the fact that an individual fundamental right is at issue should play into the Court's analysis of whether the State has waived its sovereign immunity and consented to suit for monetary damages under the statute.

In this case, there is no dispute that a fundamental right is at issue. The case involves an individual's religious liberty, and RLUIPA is tailored to protect religious liberty, which "is a constitutional value of the highest order." *Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000*, 2 *Pub. Papers* 1906 (Sept. 22, 2000). Since the First Congress and the ratification of the Bill of Rights, it has been axiomatic that the free exercise of religion is a fundamental right. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974)

("Unquestionably, the free exercise of religion is a fundamental constitutional right.").

The fundamental right to the free exercise of religion applies to all citizens, including prisoners, and the right is not limited or pared down simply because an individual is institutionalized: "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty." *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). Thus, as this Court has previously held, RLUIPA properly protects institutionalized persons who are "dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 721.

With RLUIPA, Congress sought to protect these fundamental freedoms by allowing monetary as well as injunctive relief—giving full, not partial, protection to State violations of First Amendment liberties. Holding that RLUIPA does not include the possibility of monetary damages against a State or a State officer in his official capacity would elevate a State's sovereignty above an individual's fundamental rights as enumerated in the First and Fourteenth Amendments and as protected by RLUIPA. Because a State which accepts federal funds under RLUIPA waives its sovereign immunity generally, and the type of remedy available through that waiver is irrelevant in evaluating State sovereign immunity, the dignity accorded States consistent with their status as sovereign entities will not be harmed if monetary damages are deemed recoverable under RLUIPA.

II. THE PRACTICAL EFFECT OF AFFIRMING THE FIFTH CIRCUIT'S HOLDING WOULD BE CRIPPLING TO CONGRESSIONAL INTENT AND THE LEGITIMATE EFFORTS OF ORGANIZATIONS SUCH AS *AMICI* TO REMEDY VIOLATIONS OF RLUIPA.

"[RLUIPA] is . . . designed to protect the free exercise of religion from unnecessary governmental interference." 146 Cong. Rec. H7190 (daily ed. July 27, 2000) (statement of Hon. Charles T. Canady). In the Congressional proceedings on religious freedom legislation that led to RLUIPA, Congressional findings revealed widespread governmental infringement of the free exercise of religion in the institutional context: "prison officials sometimes imposed frivolous or arbitrary rules" and "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict[ed] religious liberty in egregious and unnecessary ways." 146 Cong. Rec. S7774–75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (noting three years of House and Senate hearings addressing the need for legislation to target frequently occurring burdens on religious liberty). Accordingly, Congress enacted RLUIPA to afford added protection to religious liberty. In particular, RLUIPA was intended to guard the fundamental right to "religious exercise of a class of people particularly vulnerable to governmental regulation, and that is institutionalized persons." 146 Cong. Rec. H7190 (daily ed. July 27, 2000) (statement of Hon. Charles T. Canady). *See also Cutter*, 544 U.S. at 721 ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious

needs and are therefore dependent on the government's permission and accommodation for exercise of their religion").

If only equitable relief is available under RLUIPA, there is virtually no incentive for a State or State official to abide by its prohibitions. They could effectively use federal funds while simultaneously violating RLUIPA with little or no risk other than the threat of eventually being scolded by a court to stop. Such an interpretation would unreasonably inhibit an individual's fundamental right to religious exercise in contravention of RLUIPA's purpose. Additionally, this interpretation would contradict Congress's intent of protecting religious exercise and deterring the States from violating RLUIPA by permitting States and State actors to freely infringe on those liberties with impunity.

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Maritime Comm'n*, 535 U.S. at 760 (citing *In re Ayers*, 123 U.S. 443, 505 (1887)). Failing to permit aggrieved parties to recover monetary damages under RLUIPA would not promote this preeminent purpose; rather, it would encourage States and State actors to undermine this dignity by violating RLUIPA until they were ordered to stop by a federal court or, more likely, decided to stop in order to moot a meritorious RLUIPA claim.. Indeed, this pattern has already reared its head in the lower courts. For example, in 2009 the Seventh Circuit determined that a RLUIPA claim was moot because a prison began serving meals in accordance with an inmate's religious beliefs three years after the inmate filed suit. *See Nelson v. Miller*, 570 F.3d 868, 882 (7th

Cir. 2009). Moreover, a lower court has held a prisoner's RLUIPA claim moot after the defendant altered its policy and permitted prisoners to wear religious garbs in certain circumstances. *Boles v. Neet*, 402 F. Supp. 2d 1237, 1241 (D. Colo. 2005), *aff'd on other grounds*, 486 F.3d 1177 (10th Cir. 2007).

The absurd results that would occur if States and State actors are permitted to violate RLUIPA until the last possible moment stand in stark contrast to Congress's intent to deter the States' from committing constitutional wrongs. Often when a person's fundamental right to religious exercise is violated in breach of RLUIPA, injunctive relief is pointless because the relief would come too late. For example, if a prison inmate with sincere religious beliefs discovered, days before a sacred holiday, that he would be required to work at his prison job during the holiday (or otherwise have his observance of the holiday inhibited in violation of RLUIPA), there would be no time for an injunction to provide the prisoner relief. The sacred holiday would have passed, taking with it the individual's fundamental right to religious freedom, by the time the inmate was able to exhaust administrative remedies and seek an injunction. Similarly, if a prisoner with a legitimate RLUIPA claim were released during the litigation process, injunctive relief would become moot and pointless. One scholar has noted similar issues in the land use context of RLUIPA, stating that "the absence of damages [in RLUIPA's remedial provision] would create a perverse incentive for municipalities to drag out the conditional use permit . . . and litigation process for as long as possible, with the hope that an appellant will eventually lose the

land, and with it, their entire cause of action." Daniel P. Dalton, *Defining "Appropriate Relief" Under the Religious Land Use and Institutionalized Persons Act: The Availability of Damages and Injunctive Relief with RLUIPA*, 2 Alb. Gov't L. Rev. 604, 616 (2009).

As these examples demonstrate, in many cases, monetary relief may be the only deterrent that could reasonably be fashioned to prevent legitimate RLUIPA violations. Congress could not and did not create RLUIPA to provide a right without a remedy. As Chief Justice John Marshall observed, "[t]he Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (emphasis added). The practical effect of reading legal remedies out of the phrase "appropriate relief" in RLUIPA will be to create the paradox of having a Federal statute, applicable to the States, which permits the States to violate or obey it at the whim of the very actors Congress sought to confine. RLUIPA should not be enfeebled in this manner, particularly at the expense of fundamental liberties.

III. THE PRISON LITIGATION REFORM ACT DOES NOT BAR THE PETITIONER'S CLAIM FOR MONETARY DAMAGES.

The Respondents have argued at the petition stage that the Court need not address the question of monetary damages under RLUIPA because they claim the Prison Litigation Reform Act of 1995 ("PLRA") bars any damages award and prohibits all

prisoner suits seeking damages for non-physical injury, regardless of whether RLUIPA allows monetary damages against a State or State official in his official capacity. Br. for Resp't in Opp'n to Pet. for Writ of Cert. at 4. This argument misses the mark because (1) the Respondents' reading of the PLRA is overly broad and misinterprets the plain language of the PLRA and (2) the PLRA does not bar claims for nominal damages.

A. The Plain Language of the PLRA Demonstrates that it Does not Bar the Claim at Issue.

The plain language of the PLRA, 42 U.S.C. § 1997e(e), does not indicate that a mere lack of a physical injury completely bars an incarcerated person from seeking recovery against a tortfeasor. Rather, only those claims brought "for mental or emotional injury" are barred absent a prior showing of physical injury. *Id.* The proper intention of the statute is that the requirement of a "prior showing of physical injury" modifies specific claims, namely, actions "for mental or emotional injur[ies]." *Id.* If an action is *not* for mental or emotional injury, the claimant need not make a prior showing of physical injury. Thus, if a claim alleges a non-physical injury that is not "for mental or emotional injury suffered," such as a claim for violation of First Amendment rights, as well as a claim under RLUIPA specifically, the PLRA does not preclude that claim.

Respondents incorrectly interpret the PLRA to limit damages exclusively to suits for physical injury. Such a reading "would render superfluous the qualifying language 'for mental or emotional injury' and would be contrary to the well-established

principle that all words in a statute should be read to have meaning. . . . If Congress had intended to apply § 1997e(e)'s restriction to all federal civil suits by prisoners, it could easily have done so simply by dropping the qualifying language 'for mental or emotional injury.'" *Amaker v. Haponik*, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999). *See also Doe v. Chao*, 540 U.S. 614, 631 (2004) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citations omitted) (internal quotation marks omitted).

The private right of action provided under RLUIPA does not require a showing of injury, whether physical or non-physical, in order to succeed on a claim for relief. Instead, RLUIPA provides that a person whose First Amendment right "has been burdened in violation of [RLUIPA] may assert that violation as a claim." 42 U.S.C. § 2000cc-2(a). Put another way, a claim brought under RLUIPA is not "for mental or emotional injury suffered" but is simply for violations of RLUIPA. Therefore, the PLRA does not preclude an award of damages for claims under RLUIPA.

Moreover, lower courts have held that claims for constitutional violations of fundamental rights, such as those asserted under RLUIPA, do not fall within the PLRA's bar to recovery. As one circuit has aptly explained, "[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First

Amendment claims regardless of the form of relief sought." *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). Similarly, the Seventh Circuit has "held explicitly that prisoners need not allege a physical injury to recover damages because the deprivation of the constitutional right is itself a cognizable injury, regardless of any resulting mental or emotional injury." *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (citing *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999)). Although some circuits have held to the contrary, those cases did not completely foreclose RLUIPA claims where the PLRA may also apply.[9] In short, the PLRA bars only claims brought for mental or emotional injuries; such injuries are distinct from injuries to an individual's constitutionally protected fundamental rights. For this reason, the PLRA is inapplicable here.

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[9] For example, in *Smith v. Allen*, 502 F.2d 1255 (11th Cir. 2007), the Eleventh Circuit held that although RLUIPA's "appropriate relief" is broad enough to encompass monetary damages, a prisoner plaintiff's right to relief is significantly circumscribed by the PLRA. *Id.* at 1271. Relying on *Napier v. Preslicka*, 314 F.3d 528 (11th Cir. 2002), the court assumed that the phrase "[f]ederal civil action" in §1997e(e) includes constitutional claims. However, neither *Smith* nor *Napier* addressed whether §1997e(e) was intended to cover *all* "[f]ederal civil action[s]" or only those "for mental or emotional injury"—as distinct from constitutional claims. The Court in *Smith* also acknowledged the PLRA would not bar nominal damages for violation of a constitutional right. The other two circuit opinions finding that the §1997e(e) barred First Amendment claims, *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam), and *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001), did not address this issue in the RLUIPA context.

B. The PLRA Does not Bar Claims for Nominal Damages, Which the Petitioner can Demonstrate in Accordance with RLUIPA.

Notably, the PLRA does not bar a claim for nominal damages. Several circuits have already reached this conclusion. *See, e.g.*, *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (nominal, punitive, injunctive and declaratory relief available under PLRA); *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (PLRA does not bar nominal damage awards); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (same); *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) ("[S]ection 1997e(e) does not bar recovery of nominal damages for violations of prisoners' rights."); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (approving recovery of nominal damages without proof of actual injury).

As set forth above, Section 2000cc-2(a) provides that a person whose First Amendment right "has been burdened in violation of [RLUIPA] *may assert that violation as a claim*" (emphasis added). Because "a claim" in the statute, by definition, must include at least nominal damages, legitimate RLUIPA violations that would trigger at least nominal damages may not be barred by the PLRA.

CONCLUSION

For the reasons set forth above, *amici* respectfully request this Court to conclude that an individual may sue a State or a state official in his official capacity for damages for violations of RLUIPA.

Respectfully submitted,

James K. Lehman
Counsel of Record
William C. Wood, Jr.
Jay T. Thompson
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street
Columbia, SC 29201
Jim.Lehman@nelsonmullins.com
(803) 799-2000

Kimberlee Wood Colby
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, VA 22151
(703) 894-1087

Pat Nolan
PRISON FELLOWSHIP
44180 Riverside Parkway
Lansdowne, VA 20176
(703) 554-8569

Counsel for *Amici Curiae*

August 6, 2010

APPENDIX

APPENDIX
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Spending Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 1, provides, in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States * * * *

II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides, in relevant part:

> **Section 2000cc-1. Protection of religious exercise of institutionalized persons**
>
> (a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person —

(1) is in furtherance of a compelling government interest; and

(2) is the least restrictive means of furthering that compelling interest.

(b) Scope of application

This section applies in any case in which —

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Section 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

* * * * *

e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. * * * *

Section 2000cc-3. Rules of construction

* * * * *

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

* * * * *

Section 2000cc-5. Definitions

In this chapter:

* * * * *

(4) Government

The term "government" —

(A) means —

(i) a State, county, municipality, or other governmental entity

created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law * * * *

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

* * * * *

The Prison Litigation Reform Act of 1995 ("PLRA") provides, in relevant part:

42 U.S.C. § 1997e(e). Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

AMICUS CURIAE BRIEF

No. 08-1438

In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

BRIEF OF FLORIDA, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

BILL MCCOLLUM
Attorney General of Florida
Scott D. Makar*
Solicitor General
Courtney Brewer
Deputy Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
**Counsel of Record*

Troy King
Attorney General
State of Alabama
500 Dexter Avenue
Montgomery, AL 36130

Daniel S. Sullivan
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

Terry Goddard
Attorney General
State of Arizona
1275 W. Washington
Phoenix, AZ 85007

Edmund G. Brown, Jr.
Attorney General
State of California
California Department
of Justice
P.O. Box 944255
Sacramento, CA
94244-2550

John W. Suthers
Attorney General
State of Colorado
1525 Sherman Street,
Seventh Floor
Denver, CO 80203

Thurbert E. Baker
Attorney General
State of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

Mark J. Bennett
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Lisa Madigan
Attorney General
State of Illinois
100 W. Randolph St.,
12th Floor
Chicago, IL 60601

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Floor
Indianapolis, IN 46204

Janet T. Mills
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

Douglas F. Gansler
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

Michael A. Cox
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

Jim Hood
Attorney General
State of Mississippi
Post Office Box 220
Jackson, MS 39205

Steve Bullock
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Jon Bruning
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

Catherine Cortez Masto
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

Michael A. Delaney
Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, ND
58505-0040

Richard Cordray
Attorney General
State of Ohio
30 East Broad Street,
17th Floor
Columbus, OH 43215

W.A. Drew Edmondson
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK
73105-4894

Thomas W. Corbett, Jr.
Attorney General
Commonwealth of
Pennsylvania
16th Floor,
Strawberry Square
Harrisburg, PA 17120

Patrick C. Lynch
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

Henry D. McMaster
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14,
Suite 1
Pierre, SD 57501-8501

Mark Shurtleff
Attorney General
State of Utah
Utah State Capitol
Suite #230
P.O. Box 142320
Salt Lake City, UT
84114-2320

Kenneth T. Cuccinelli, II
Attorney General
State of Virginia
900 East Main Street
Richmond, VA 23219

J.B. Van Hollen
Attorney General
State of Wisconsin
WI Department of
Justice
P.O. Box 7857
Madison, WI 53707-7857

Bruce A. Salzburg
Attorney General
State of Wyoming
123 Capitol Building
200 W. 24th Street
Cheyenne, WY 82002

QUESTION PRESENTED

Whether an individual may sue a state or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*

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STATEMENT OF AMICI INTEREST

The Amici States have a significant interest in this case because the petitioner's argument, if accepted, would greatly diminish the level of clarity in federal statutes that purport to condition the grant of funds on the States' waiver of sovereign immunity. Rather than looking to and relying upon the absence of explicit waiver language in a funding statute as their guide, States would now have to consider the oftentimes uncertain language of the statute and its background principles. If they incorrectly interpret the language or principles, States will be subject to litigation they did not anticipate and damage awards for which they did not prepare. The Amici States did not anticipate that the broad term "appropriate relief" in the Religious Land Use and Institutionalized Persons Act (RLUIPA) would waive their sovereign immunity to damages actions. To subject the States to damages actions on the basis of the ambiguous phrase "appropriate relief" would offend well-established principles of federalism and stare decisis.

SUMMARY OF ARGUMENT

The sovereign immunity of the States, though "universally received," *Cohens v. Virginia*, 19 U.S. 264, 411 (1821), is not universally secure. It is beyond contention that when this Court examines a claim that state sovereign immunity has been waived or abrogated in a federal statute, it has required that the statutory language purporting to waive that immunity be clear and express. Sovereign immunity may be relinquished voluntarily by statute, or the federal government may abrogate state immunity in accordance with its Fourteenth Amendment powers, or a State may waive immunity by its acceptance of federal funds. Regardless of the manner by which sovereign immunity is relinquished, the requirement that it be express and via unambiguous language is immutable.

The Court has viewed state and federal sovereign immunity waiver principles similarly, both evolving from the same common law doctrine that requires a strict construction. That doctrine forms a critical element in the functioning and dignity of each sovereign by ensuring that each government's operations are not thwarted or undermined by the burdens and expense of litigation and damage awards. To ensure that these purposes are fulfilled, the Court has not deviated from the strict construction that it has always required when a waiver of sovereign immunity is alleged.

Given the shared history and purposes of federal and state sovereign immunity, the requirements for demonstrating waiver should

remain the same and not be compromised. This Court can only fulfill the promise of the Eleventh Amendment and protect dual sovereignty by maintaining that a State's waiver by Spending Clause legislation must be premised on express and unambiguous language. Adherence to this principle is particularly important in this case due to the reliance of the States in accepting federal funds subject to conditions; when Congress uses language in a Spending Clause statute that is intended to waive state sovereign immunity, it should do so with the same clarity required to waive its own immunity. Here, the statute at issue, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, *et seq.*, provides that the States are subject to actions for "appropriate relief," language that is not sufficiently clear and unambiguous to waive immunity for compensatory damages. Because it is susceptible to at least two plausible readings, States could not have known that they were consenting to lawsuits for damages. The Fifth Circuit's decision should be affirmed.

ARGUMENT

I. The principles and purposes of sovereign immunity require a narrow reading of the States' waiver of immunity under RLUIPA.

It has long been the law that statutory language purporting to waive the immunity of a sovereign entity must be unequivocal. Petitioner claims that sovereign immunity principles applicable to the federal government apply here, but his legal arguments would make the States equivalent to other private entities under RLUIPA by eliminating the requirement of unequivocal language for a State's immunity waiver. Pet'r Br. 37. This Court's jurisprudence, however, has unfailingly required an unambiguous, textual expression of the intent to waive this sovereign prerogative. The shared history and purposes of state and federal sovereign immunity support the conclusion that States receive the same benefit of strict construction as the federal government. The language of RLUIPA, providing for "appropriate relief," is not a clear and unequivocal waiver of the States' immunity to damages for the reasons set out below.

A. Throughout the development of sovereign immunity jurisprudence, this Court has never departed from the requirement that waivers must be express and unambiguous.

1. To find that the States have waived their sovereign immunity to damages actions under RLUIPA would require this Court to depart from well-established law. Repeatedly, and in a variety of contexts, this Court has set forth that waivers must be unequivocally expressed by statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (applying principle to the federal government); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) (same); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (when participating in a federal program, State waives its immunity "only where stated by the most express language or by such overwhelming implication from the text as (will) leave no room for any other reasonable construction.") (quotation marks and citation omitted); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (*Pennhurst II*) (requiring an "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States.") (quotation marks and citation omitted).

Even when waiver is unequivocally expressed, the Court still narrowly reads the terms of the waiver. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 590 (1941) (applying the Tucker Act, through which the United States consented to damages suits for contract violations, and reading the waiver

narrowly as to in which court an action could be brought under its terms). This cornerstone of immunity jurisprudence applies no matter the sovereign involved -- be it the federal or a state government -- or the manner by which sovereign immunity is relinquished — be it by statutory waiver, contract, abrogation, or a waiver conditioned on the acceptance of funds. *Id.*; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (it is a requirement "well established in [the Court's] cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) (*Pennhurst I*) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds"). Indeed, when Spending Clause waivers are at issue, there can "be no knowing acceptance if a State is unaware of the conditions" it will face if a statute is violated. *Pennhurst I*, 451 U.S. at 17.

The "sovereign immunity canon" yields only if "there is no ambiguity left ... to construe." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). A waiver is ambiguous if the relevant language is capable of more than one meaning. *Nordic Vill., Inc.*, 503 U.S. at 34-37 (because statute was susceptible to two conflicting interpretations, Court held it did not waive the federal government's immunity to monetary damages). The term "appropriate relief," therefore, may waive the States' sovereign immunity to compensatory damages actions under RLUIPA when they accept federal funds only if the statute is

clear that there can be no other plausible meaning for the term. *See West v. Gibson*, 527 U.S. 212, 218 & 222 (1999) ("appropriate" relief included, and federal sovereign immunity was waived for, damages actions when the statute specifically authorized compensatory damages relief).

2. Petitioner and the United States as amicus curiae assert that the clarity threshold for overcoming sovereign immunity is less stringent when sovereign immunity is waived by a State's acceptance of federal funds than by a unilateral federal statutory waiver. Pet'r Br. 31-33; U.S. Br. 9, 21. They seek to distance the analysis in this case from the strict construction applied to the federal government's waiver of its own immunity. *Lane*, 518 U.S. at 192. The United States even contends that a State's sovereign immunity waiver in exchange for conditional funds is "not at all equivalent" to a voluntary federal government waiver. U.S. Br. 21.

But this Court's caselaw reveals no basis for changeable levels of the clarity required in a waiving statute. In every situation, the Court requires "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero State Hosp.*, 473 U.S. at 238 n.1; *see also Pennhurst I*, 451 U.S. at 17 ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously"). Waivers in Spending Clause legislation must therefore state in unambiguous language any conditions placed on state recipients, so that the States can "exercise their choice knowingly, cognizant of the consequences of their

participation." *Pennhurst I*, 451 U.S. at 17; *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Indeed, the very "legitimacy of Congress' power to legislate under the spending power ... rests on whether the state voluntarily and knowingly accepts the terms." *Pennhurst I*, 451 U.S. at 17.

Spending Clause legislation, therefore, does not require less clarity to waive state sovereign immunity. As Texas provides in its brief, the cases cited by the petitioner in support of his claim to the contrary actually invoke the Spending Clause as a *limit* on the broad presumption for the typical relief available under *Bell v. Hood*, 327 U.S. 678 (1946). Resp. Br. 30. Moreover, the clear statement rule has all the greater import in Spending Clause legislation, because "the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it must do so unambiguously" is a "vital safeguard for the federal balance." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting) ("Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power."); *see also infra* pp. 16-18. "Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability." *Davis*, 526 U.S. at 656-57 (Kennedy, J., dissenting). The "watered-down version of the Spending Clause

clear-statement rule," *id.* at 686, that the petitioner seeks is not what the Constitution requires.

In analyzing allegations of waiver, the Court does not hesitate to rely on principles from cases among the spectrum of categories by which sovereign immunity may be relinquished. In *Atascadero*, for instance, this Court analyzed claims that the relevant statute either abrogated the States' immunity or conditioned waiver on the States' acceptance of federal funds. 473 U.S. at 240. In rejecting the argument that the State waived its immunity by accepting federal funds, the Court noted that it had already determined that the Act did not abrogate immunity, and held that the "Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id.* at 247. *See also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("in the context of *federal* sovereign immunity — obviously the closest analogy to the present case — it is well established that waivers are not implied. ... We see no reason why the rule should be different with respect to state sovereign immunity."); *Lane*, 518 U.S. at 200 (noting language used to abrogate state immunity showed that Congress did not intend to waive federal immunity in same statute); *Nordic Vill., Inc.*, 503 U.S. at 37 (in analyzing federal claims of sovereign immunity, the Court provided: "As in the Eleventh Amendment context, ... the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."); *Tindal v. Wesley*, 167 U.S. 204, 213

(1897) ("But it cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States.").

Petitioner and the United States suggest that principles applicable to the interpretation of contracts should guide the interpretation of statutes imposing conditions on the States' acceptance of federal funds. Pet'r Br. 33-34; U.S. Br. 11, 22. Sovereign immunity, however, is a jurisdictional matter, one that requires an elevated level of clarity to be waived. *Edelman*, 415 U.S. at 673, 678. It is well established that statutory interpretation principles do not trump the requirements of sovereign immunity. *Block v. North Dakota*, 461 U.S 273, 288 (1983) (refusing to give precedence to a canon of statutory construction over the principle of sovereign immunity).

Moreover, as Texas asserted, the contract analogy does not further petitioner's argument, because even in that context, a clear statement of waiver is required. Resp. Br. 31. Sovereign immunity provides a special defense that exists outside of, and separate and apart from, contract law. *See Lynch v. United States*, 292 U.S. 571, 580-581 (1934) ("Contracts between individuals or corporations are impaired within the meaning of the Constitution ... whenever the right to enforce them by legal process is taken away or materially lessened. *A different rule prevails in respect to contracts of sovereigns.* ... "The contracts between a Nation and an individual are only binding on the conscience of the sovereign, and

have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.' The rule that the United States may not be sued without its consent is all-embracing.") (emphasis added) (footnotes omitted) (quoting Hamilton, The Federalist, No. 81).

The federal government must still expressly waive its sovereign immunity to damages claims under its contracts, as it does through the Tucker Act. *See* Resp. Br. 33; *Sherwood*, 312 U.S. at 590. As Texas states in its brief, the Tucker Act "only confirms the need for a textual waiver of sovereign immunity that is clear as to the scope of relief" because there "Congress expressly consented to a damages remedy for a breach of federal contracts." Resp. Br. 32. And this waiver is not because of underlying notions of contract law, but rather because of the Tucker Act's creation of jurisdiction over the federal government's contract violations with the United States Court of Federal Claims. *Id.* at 33. In addition, if petitioner's argument was carried to its logical conclusion, all contract remedies would be available against the United States under the Tucker Act, including specific performance. Restatement (Second) of Contracts § 345. Certainly, the federal government would not concede that it has waived its sovereign immunity to actions seeking specific performance under the Tucker Act. *See United States v. King*, 395 U.S. 1, 2-3 (1969) (jurisdiction of the Federal Claims Court is limited to damages actions); *Cardiosom, LLC v. United States*, 91 Fed. Cl. 659, 663 (Fed. Cl. 2010) ("Federal district courts consistently hold that the Tucker Act impliedly prohibits district courts from ordering

specific performance by United States on its alleged contractual obligations.").

No principled reason exists to require a lesser standard of clarity for Spending Clause legislation that conditions federal funds on States' waiver of their sovereign immunity. It is beyond dispute that statutes must clearly and unequivocally authorize or impose waivers of immunity, including the scope of such waivers, no matter the sovereign involved or the category of relinquishment.

B. Federal and state sovereign immunity doctrines share a similar history and purpose, and their critical import requires a narrow reading of a statute alleged to waive that immunity.

As explained in the previous section, to find that the States have waived their sovereign immunity to damages actions under RLUIPA, this Court would have to ignore its traditional sovereign immunity doctrine. A close look at the purpose and history of federal and state sovereign immunity reveals that the two doctrines originated from the same source, and therefore deserve a similar construction. The history and purpose also show that a strict construction is required to ensure that the States maintain their unique constitutional status.

1. Sovereign immunity derives from the common law of England, where it required a strict and unyielding construction. *United States v.*

Williams, 289 U.S. 553, 573 (1933) ("in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought against the United States."); *Brown v. Sec'y of the Army*, 78 F.3d 645, 649-50 (D.C. Cir. 1996) ("From an historical perspective, the doctrine rests upon the notion that 'it would contradict the sovereignty of the king to allow him to be sued as of right in his own courts.' The sovereignty of the king has been succeeded by the sovereignty of the people, acting through their elected delegates, but the rule of strict construction still serves to insure that courts defer to the precise terms of their consent.") (citation omitted). Such immunity is "inherent in the nature of sovereignty." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting Hamilton, The Federalist, No. 81).

The common law principle carried over to both the fledgling federal and state governments. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.' ") (citation omitted); *Williams*, 289 U.S. at 577 (" 'The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, (that is to say, as applied to the present case, of suits against the United States) was not contemplated by the Constitution when establishing the judicial power of the United States.' ... This language applies with equal force to suits against a state and those brought against the United States.") (quoting *Hans*,

134 U.S. at 15). The States are sovereign, and incur the same benefits and responsibilities that sovereignty brings to the federal government. *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 477 (1987) ("the constitutional role of the States sets them apart from other employers and defendants."). Indeed, "[t]he suability of a state, without its consent, was a thing unknown to the law." *Hans*, 134 U.S. at 16.

Any doubt as to the States' right to be free from suit and liability was quickly put to rest with the passage of the Eleventh Amendment. *Id.* at 11 ("[The Eleventh Amendment], expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court [in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)]. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits."); *see also Williams*, 289 U.S. at 574. Though the Eleventh Amendment is "a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government," *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002), the sovereign immunity it crystallizes for the States is as powerful and important as the federal government's sovereign immunity and therefore requires equivalent clarity when purportedly waived by federal statute.

2. Sovereign immunity survived in the United States because of the critical protection it provides to sovereign governments. That protection is not only

from the indignities of litigation, *Fed. Mar. Comm'n*, 535 U.S. at 760 ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); *United States v. Sherwood*, 312 U.S. 584, 591 (1941) (sovereign immunity protects the United States from "the embarrassments" of litigation), but also ensures that the sovereigns are only subjected to the expense and diversions from their usual responsibilities when their immunity is properly waived.

Also critical to both sovereigns is the protection of funds appropriated for other pressing needs. *Fed. Mar. Comm'n*, 535 U.S. at 765 ("state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens' ") (quoting *Alden v. Maine*, 527 U.S. 706, 750-51 (1999)); *Brown*, 78 F.3d at 650 ("The rule of strict construction is thus arguably necessary, as we once put it, to 'protect [ ] the United States Treasury from potentially excessive liabilities which Congress did not anticipate.' ") (citation omitted). Public funds are to be protected, and the diminishing of those funds due to unwaived liabilities are prohibited by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. This interest is all the more critical to the States because, unlike the federal government, nearly all States are required to balance their budgets.[1]

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[1] *See* National Conference of State Legislatures, State Balanced Budget Requirements, Executive Summary, (1999) http://www.ncsl.org/default.aspx?tabid=12660, (last visited (Continued...)

Being steeped in a common law tradition of strict construction, state sovereign immunity today requires no less deference than federal immunity. Language alleged to waive that immunity must therefore be strictly construed. To read RLUIPA as petitioner urges would cast aside the States' critical interests and place them on the same "footing" as private parties in a manner that the United States would not be subjected to. *Lane*, 518 U.S. at 196. Petitioner's argument runs afoul of the history and purpose of sovereign immunity, and should be rejected.

C. Practical and policy implications counsel in favor of a limited reading of any statutory text alleged to waive a sovereign's immunity.

Federalism concerns also require a narrow reading of a statute allegedly waiving state sovereign immunity. This Court has called the protection of state immunity "vital" to federalism. *Pennhurst II*, 465 U.S. 89, 99-100 (1984) ("This jurisdictional bar applies regardless of the nature of the relief

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Sept. 27, 2010) ("All the states except Vermont have a legal requirement of a balanced budget. Some are constitutional, some are statutory, and some have been derived by judicial decision from constitutional provisions about state indebtedness that do not, on their face, call for a balanced budget."); *see id.* at State Constitutional and Statutory Requirements For Balanced Budgets, http://www.ncsl.org/Default.aspx?TabId=12612 (list of each state's provisions).

sought."). That concern is heightened in the case of a State's acceptance of funds conditioned on a waiver of its immunity. *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) ("To be sure, a Spending Clause statute that conditions an entire block of federal funds on a State's compliance with a federal directive raises coercion concerns."); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting) (noting that the clear statement rule in Spending Clause legislation is a "concrete safeguard in the federal system."). When states accept funds, they do so at the mercy of the words Congress has written, and must be able to rely on the rule that only the plain and express language regarding that waiver and its limitations will be enforced. *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 769 (2002) ("By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to reduce the risk of tyranny and abuse from either front.") (quotation marks and citation omitted).

By contrast, Congress itself writes the statutes that waive federal immunity. Congress has the power to amend those statutes if a court interprets their provisions too broadly and nullifies federal sovereign immunity. States lack that power; they cannot directly rectify the federal statute or otherwise undue the mischief done. Given the power of Congress to control and amend federal law, it is counterintuitive to permit *less* clarity (or greater ambiguity) in federal statutes that purportedly waive

state sovereign immunity. When Congress crafts statutory language that is meant to waive a State's immunity, it must do so with the same clarity required to waive its own immunity. *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.) ("the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the lawmakers"); *see also* Resp. Br. 16 ("This clear statement rule provides an important constitutional check on Congress as well."). For, if the Spending Clause power is "wielded without concern for the federal balance," it "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis*, 526 U.S. at 654-55 (Kennedy, J., dissenting). Justice Kennedy's fears have special purchase in this case, because Congress enacted RLUIPA precisely for this purpose — to impose regulations through the Spending Clause that "otherwise would lie outside its reach" in light of this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). *See* Resp. Br. 6.

The States have understood the term "appropriate relief" to exclude damages as reflected in the decisions of circuits nationwide. *See, e.g.*, *Madison*, 474 F.3d at 132 ("[T]he fact that 'appropriate relief' is open-ended forecloses any argument that the statute waives immunity for monetary relief."); *Cardinal v. Metrish*, 564 F.3d 794, 801 (6th Cir. 2009) ("We hold that, because RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver

extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA."); *Nelson v. Miller*, 570 F.3d 868, 884 (7th Cir. 2009) ("The term 'appropriate relief' is open to several interpretations and does not provide the 'unequivocal textual expression' necessary to effect a sovereign's waiver to suits for damages."); *Van Wyhe v. Reisch*, 581 F.3d 639, 654 (8th Cir. 2009) ("... RLUIPA's 'appropriate relief' language does not unambiguously encompass monetary damages so as to effect a waiver of sovereign immunity from suit for monetary claims under Section 3 by acceptance of the federal money."); *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1112 (9th Cir. 2010) ("The phrase 'appropriate relief' does not address sovereign immunity specifically at all, let alone extend a waiver of sovereign immunity unambiguously to monetary claims in particular.") (citation, quotation marks, and alterations omitted).

The decisions listed above and arguments of the States rely on this Court's immunity decisions, *Lane v. Pena*, 518 U.S. 187, 197 (1996) (adopting the government's position that "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived"), and the loose terminology in RLUIPA of "appropriate relief." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (appropriate relief is "not the sort of unequivocal waiver that our precedents demand ..., because that broad term is susceptible to more than one interpretation.") (quotation marks and citation omitted). Texas is not alone in the

arguments it makes herein. Moreover, it plus the thirty other States in these circuits have come to rely on the decisions of their respective Courts of Appeals holding that RLUIPA is ambiguous and does not waive state sovereign immunity to damages. 28 U.S.C. § 41 (listing states in each judicial circuit).

The only circuit court to have considered this issue and imposed damages on a State under RLUIPA did not specifically address the clarity required for immunity waivers. *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007). Rather, the Eleventh Circuit presumed that a damages remedy was available, finding the phrase "appropriate relief" broad. *Id.* It did not consider whether its presumption of damages outweighed the presumption that an ambiguous statute cannot waive sovereign immunity.

Petitioner compares the appropriate relief provided for in section 2000cc-2(a) of RLUIPA to the specific "injunctive or declaratory relief" authorized for federal government enforcement under section 2000cc-2(f). He contends that because language in the latter section expressly limits the relief available in actions against the States by the federal government, the former section must anticipate broader relief. Pet'r Br. 21. But that same principle of statutory construction could also counsel against a finding of waiver. To construe section 2000cc-2(a) in compliance with section 2000cc-3(e) and maintain internal statutory consistency would require a conclusion that RLUIPA *does not* authorize damages claims. Section 2000cc-3(e) provides that "[a] government may avoid the preemptive force of any

provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise ... ." Damages are recovered for past conduct and cannot be avoided by later behavior.[2] This provision indicates that under RLUIPA, States are only subject to forward-looking relief. These conflicting passages do not provide States unambiguous notice that they waived their immunity to damages actions under RLUIPA's terms. *See also* Resp. Br. 24-25.

Moreover, this Court has stated in the context of federal sovereign immunity that "the lack of a perfect correlation in the various provisions does not indicate ... that the reading proposed by the Government is entirely irrational." *Lane*, 518 U.S. at 196. Because principles of statutory interpretation make the scope of relief available ambiguous, no

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[2] The United States contends that, text aside, damages are necessary to prevent RLUIPA claims from becoming moot. U.S. Br. 16-17. But the choice of remedies is a quintessential policy judgment for Congress, not the courts, to determine. And in any event, as Texas points out, mootness is not necessarily a bad development. Resp. Br. 35. When an RLUIPA case becomes moot, it is often because the State has acknowledged that the plaintiff has identified a valid claim and has acted to cure it. Put simply, there is nothing wrong with a case becoming moot because the State has voluntarily adopted real change. Present mootness doctrines ensure that States do not moot cases by insincere or fraudulent expressions of change. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (applying a "stringent" standard and "heavy burden" on litigants to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") (citation omitted).

unequivocal waiver by the States of their immunity to damages can exist.

It is not enough for waiver purposes that the petitioner and the United States are able to state a plausible argument that a damages action may be pursued against the States under RLUIPA. *See* Pet'r Br. 14-16 (citing *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002)). The meaning of the term "appropriate relief" is not, as they allege, well-settled, for courts have recognized that "[i]t is at least equally plausible that, in other contexts, the term might be read to preclude them." *Madison*, 474 F.3d at 132; *see also Shea v. Rockland*, 810 F.2d 27, 29 (2d Cir. 1987) (the phrase "other appropriate relief" does not include compensatory damages); Resp. Br. 19 (the meaning of this term "is entirely indeterminate in the absence of context."). As the Fourth Circuit held, the fact that the phrase appropriate relief is open-ended forecloses any argument that the statute waives immunity for monetary relief. *Madison*, 474 F.3d at 132.

Even if rules of contract construction could resolve the ambiguity were this a case involving a private fund recipient, it does not follow that no ambiguity exists sufficient to implicate sovereign immunity. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 141 (2005) (recognizing "the distinction between a canon for choosing among plausible meanings of an ambiguous statute and a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous mandate."). The presence of two plausible readings

"is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Nordic Vill. Inc.*, 503 U.S. at 32. Room is left for two conflicting reasonable constructions, and that ambiguity may not be resolved against the sovereign State. *Edelman*, 415 U.S. at 673.

Finally, it is pertinent to note that Congress had at its fingertips language that could have been used to unequivocally waive the States' immunity to damages actions, but did not use it. *Lane*, 518 U.S. at 198 (statute clearly waived sovereign immunity for the states by providing: "In a suit against a State ... remedies (including remedies both at law and in equity) are available for such a violation to the same extent such remedies are available for such a violation in a suit against any public or private entity other than a State.") (quoting § 1003 of the Rehabilitation Act Amendments of 1986); *United States v. Sherwood*, 312 U.S. 584, 587 (1941) (noting that the Tucker Act waives the United States' sovereignty to "all claims not exceeding $10,000 founded ... upon any contract") (citation omitted). Because Congress chose not to use language that would render unambiguous the scope of relief available, a State accepting funds under RLUIPA could conclude that it was not waiving its immunity to damages actions. *See, e.g., Lane*, 518 U.S. at 194 ("This provision likewise illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies for violations of the Act. The clarity of these provisions is in sharp contrast to the waiver Lane seeks to tease out of [other sections] of the Act.").

CONCLUSION

For all of the above reasons, this Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

BILL MCCOLLUM
Attorney General of Florida

Scott D. Makar*
Solicitor General of Florida
Courtney Brewer
Deputy Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
Counsel of Record

AMICUS CURIAE BRIEF

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Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONER

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
HIRAM S. SASSER, III
JUSTIN E. BUTTERFIELD
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
kshackelford@libertyinstitute.org

Counsel for Amicus Curiae

CORKLE LAW BRIEF PRINTING Co. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. NAE believes that religious freedom is a gift from God, and it is vital to limiting the government that is our American constitutional republic. RLUIPA is of vital importance to amicus' constituents because it is the most effective, and sometimes the only effective, means available to protect religious ministries from over-zealous city councils and county boards. Local governments have an incentive to quell religious ministries with land use regulations in order to attract tax revenue generating businesses. State and local governments do not always appreciate the positive contributions of religious ministries to the community because such contributions are not easily measured in monetary value. RLUIPA leveled the playing field. Without a robust RLUIPA, the incentives to exclude religious ministries from a

[1] All parties of record consented to the filing of amicus briefs in support of either or neither party. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

community through land use regulations will prevail and lead to pecuniary harm.

SUMMARY OF THE ARGUMENT

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") provides important protections that cannot effectively be enforced without appropriate relief that includes damages. If RLUIPA does not provide for damages from a State that imposes substantial burdens on institutionalized persons' free exercise of religion, and if RLUIPA does not provide for damages when States use their powers to exclude, burden, and discriminate against religious assemblies in order to favor tax-revenue-generating organizations, then RLUIPA has no teeth.

To prevent RLUIPA and other federal nondiscrimination statutes from being ineffective in stopping discrimination, the Civil Rights Remedies Equalization Act ("CRREA") abrogates or waives State immunity under RLUIPA. RLUIPA follows the same nondiscrimination language that is used in other federal nondiscrimination statutes set forth in the CRREA.

With State sovereign immunity waived or abrogated through CRREA, a private plaintiff may recover monetary damages through RLUIPA's provision of "appropriate relief," a term of art including monetary damages. In concluding that RLUIPA cannot provide for monetary damages, the Fifth

Circuit incorrectly ignored both the plain language on RLUIPA, as the Fifth Circuit itself acknowledges, and the U.S. Department of Justice's interpretation of RLUIPA, despite the Attorney General's having been given authority to enforce compliance with RLUIPA.

RLUIPA also provides for recovery of nominal damages, which are essential in that they allow for religious rights to be enforced, even when no damages are apparent. Nominal damages are the symbol of scrupulous observation owed to nondiscrimination statutes, and the Court must hold the States accountable by honoring and preserving claims for such violations. Failing to do so opens the door to the unwanted upshot of allowing a State to violate civil rights and escape legal responsibility unscathed. Nominal damages also discourage governments who want to exclude tax-exempt religious associations from high-tax areas in favor of tax-revenue-generating for-profit organizations from using legal maneuvering to mercilessly litigate against the religious association, draining the association of funds, and then simply "seeing the light" and stopping their discrimination against the religious association, without any penalty to themselves or risk of judgment, but with the "problem" religious association now lacking the funds to continue operation, having been drained by the government.

The ability to recover damages under RLUIPA is vital to the prevention of the discriminations and unfair burdens placed upon religious persons and organizations by the State and local governments.

Without this protection, institutionalized persons and religious associations are defended by a cannon for which no ball exists.

ARGUMENT

I. The Spending Clause and the Civil Rights Remedies Equalization Act together abrogate a State's Eleventh Amendment immunity for cases under RLUIPA.

Sovereign immunity does not bar private plaintiffs from recovering official-capacity damages pursuant to the "appropriate remedy" provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Civil Rights Remedies Equalization Act ("CRREA") abolishes the Eleventh Amendment's preclusion of official-capacity damages for state violations of a federal nondiscrimination statute.[2] 42 U.S.C. § 2000d-7.

When it enacted RLUIPA, Congress constructed a defense shield over America's religious institutions, safeguarding them from antagonistic zoning or landmarking decisions by State and local governments.

[2] The CRREA has features of both waiver and abrogation of sovereign immunity: State sovereign immunity is waived as a condition of accepting federal monies, yet Congress has also abolished immunity pursuant to its Fourteenth Amendment § 5 power. Regardless of the mechanism employed by the CRREA, the end result is the same: recovery of official-capacity damages.

Unlike the sweeping language of its predecessor, the Religious Freedom Restoration Act ("RFRA"), which broadly required religious accommodation in nearly every aspect of the public sphere, RLUIPA focuses on two distinct areas: (1) barring governments from placing substantial burdens on institutionalized persons' free exercise of religion and (2) prohibiting discrimination against religious institutions in the context of zoning and land use. 42 U.S.C. § 2000cc et seq. (2000 ed.); *see also City of Boerne v. Flores*, 512 U.S. 507 (1997) (striking down RFRA as applied to state and local governments). Without a remedial provision, however, the practical effect of RLUIPA would be negated. State and local governments could drag out zoning and landmarking litigation, exhausting the resources of religious assemblies, knowing that they would be subjected to no financial repercussions. Accordingly, Congress armed harmed persons by inserting into RLUIPA a provision making "appropriate relief" available to those targeted by such discriminatory practices. 42 U.S.C. § 2000cc-2. It would be counterintuitive for Congress to try to equalize the playing field between government authorities and religious assemblies only to hamstring religious assemblies. To prevent this crippling of religious assemblies' abilities to defend themselves from discriminatory government actions, Congress allowed for the recovery of "appropriate relief," including injunctive, declaratory, and monetary relief, by the religious assemblies. The Fifth Circuit's opinion below abolishes official-capacity damages,

disarming religious assemblies and crippling their capacity to repel State-sanctioned discrimination.

A. RLUIPA is constitutional under the Spending Clause.

Courts have identified three constitutional sources of power for RLUIPA: the Commerce Clause, the enforcement powers of § 5 of the Fourteenth Amendment, and the Spending Clause. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 353 (2nd Cir. 2007) ("Congress alternatively grounded RLUIPA, depending on the facts of a particular case, in the Spending Clause, the Commerce Clause, and § 5 of the Fourteenth Amendment."). Whether RLUIPA is valid under the Commerce Clause is irrelevant when considering the availability of official-capacity damages; an act passed pursuant to the Commerce Clause does *not* permit Congress to abrogate Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I [the location of the Commerce Clause] cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

The Spending Clause is one constitutional source of power for RLUIPA. To constitutionally exercise its Spending Clause power, Congress must act within the guidelines set forth by the Supreme Court. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Every

circuit to consider the constitutionality of RLUIPA validated it under at least the Spending Clause. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 329 (5th Cir. 2009) ("[W]e agree with the Eleventh Circuit's conclusion (and the implicit conclusion of the other circuits by their uniform choice to select the Spending Clause as the most natural source of congressional authority to pass RLUIPA) . . . "). Official-capacity damages may be recovered when the state, by accepting federal funds, waives its sovereign immunity. Such waiver by the state must be "unequivocally expressed in statutory text . . . and must extend unambiguously to such monetary claims." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Since Eleventh Amendment immunity does not extend to municipalities, the requirement that there be waiver of abrogation of sovereign immunity is only true when the state has violated an institutionalized person's or a religious assembly's rights under RLUIPA. *Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 193 (2006) ("[O]nly States and arms of the State possess immunity from suits authorized by federal law. Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties.") (internal cites omitted). While RLUIPA has a valid constitutional grant of authority under the Spending Clause, a statute supported by the Spending Clause alone cannot abrogate a State's sovereign immunity. To prevent this infirmity, Congress relied upon the CRREA.

B. RLUIPA is a federal nondiscrimination statute, and a State may not use sovereign immunity to avoid liability for violating RLUIPA.

The CRREA expressly abrogated sovereign immunity for recipients of federal funding for violations of federal nondiscrimination statutes. 42 U.S.C. § 2000d-7(a)(1). Because RLUIPA forbids discrimination against religious institutions in land use and zoning matters, and because States are recipients of federal funding, CRREA abrogates Eleventh Amendment immunity, and courts may not bar monetary recovery for violations of RLUIPA. CRREA, in relevant part, reads:

> *A State shall not be immune under the Eleventh Amendment* of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. § 2000d-7(a)(1) (emphasis added). The Fourth Circuit explained that "to fit within the CRREA's sovereign immunity waiver pursuant to its catch-all provision . . . RLUIPA must be like the statutes expressly listed [the Rehabilitation Act of

1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964]." *Madison v. Virginia,* 474 F.3d 118, 133 (4th Cir. 2006). Thus, the Fourth Circuit reasoned, for CRREA's catch-all provision to apply to RLUIPA, the Act must, "at a minimum[,] be aimed at discrimination" in the same way that the enumerated statutes in CRREA are aimed at discrimination. *Id.* RLUIPA passes this test. In addition to RLUIPA's limitation on the government's placing a substantial burden on institutionalized persons and religious assemblies and RLUIPA's preventing governments that want to keep non-tax-revenue-producing organizations out of their jurisdictions from excluding religious associations or unreasonably limiting the associations, RLUIPA also requires that religious associations be treated on equal terms with revenue-producing organizations and bans discrimination against religious associations.

The evidence of legislative purpose shows that RLUIPA is a nondiscrimination statute. Its Senate co-author stated that RLUIPA "prohibits discrimination against religious assemblies and institutions. . . ." 146 Cong. Rec. 14,284 (2000) (statement of Sen. Hatch). Excerpts from the Congressional Record provide evidence that Congress recognized the pervasive problem of discrimination against religious assemblies and crafted RLUIPA to prevent and remedy such discrimination:

> [W]ith respect to land use regulation, the bill specifically prohibits various forms of religious *discrimination* and exclusion.

146 Cong. Rec. 16,698 (2000) (emphasis added).

> This *discrimination* against religious [land] uses is a nationwide problem.

Id. at 16,699 (emphasis added).

> Sections 2(b)(1) and (2) *prohibit various forms of discrimination* against or among religious land uses.

Id. (emphasis added).

> The land use section of the legislation *would prohibit discrimination* against or among religious assemblies and institutions.

Id. at 14,612 (emphasis added).

> In addition, *the land use section applies to cases of discrimination* and exclusion to cases in which land use authorities can make individualized assessments of proposed land uses.

Id. (emphasis added). There is no room for uncertainty as to the nondiscrimination nature of RLUIPA; not treating RLUIPA as a nondiscrimination measure contravenes the text of RLUIPA and the evidence of legislative purpose in passing RLUIPA.

As further evidence of the nondiscrimination nature of RLUIPA, it bears noting that RLUIPA's language mirrors the language of the acts enumerated in

the CRREA. RLUIPA explicitly requires religious assemblies to be treated on equal terms with non-religious institutions and protects religious institutions from State discrimination. This tracks closely with the statutes enumerated in the CRREA:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability . . . *be subjected to discrimination* under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. ("Rehabilitation Act of 1973") (emphasis added).

> No person in the United States shall, on the basis of sex . . . *be subjected to discrimination* under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681. ("Title IX of the Education Amendments of 1972") (emphasis added).

> No person in the United States shall, on the basis of age . . . *be subjected to discrimination* under any program or activity receiving Federal financial assistance.

42 U.S.C. § 6102. ("The Age Discrimination Act of 1975") (emphasis added).

> No person in the United States shall, on the ground of race, color, or national origin . . . *be subjected to discrimination* under any

> program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. ("Title VI of the Civil Rights Act of 1964") (emphasis added).

CRREA unambiguously places States on notice that they will not be immune to suits for violations of nondiscrimination statutes. The statute further notifies States that a plaintiff has available the same remedies against the State as he or she would have against any other private or public entity. CRREA provides:

> In a suit against a State for a violation of [a nondiscrimination statute], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2).

CRREA abolishes sovereign immunity for violations of federal statutes prohibiting discrimination by recipients of federal funding. CRREA's catch-all provision encompasses RLUIPA's barring discrimination by the State. Thus, monetary relief may not be denied to private plaintiffs for RLUIPA violations. The Fifth Circuit's analysis left religious assemblies precariously defenseless to stonewalling decisions by government authorities.

II. "Appropriate relief" contemplates monetary damages.

RLUIPA allows for the recovery of "appropriate relief," a term of art intended to encompass monetary damages. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1991); *School Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, 369 (1996); *see also Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007) ("[W]e conclude that 'appropriate relief' . . . includes an award for monetary damages . . . "). As this Court stated, "In the absence of contrary indication, we assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning." *McDermott v. Wilander*, 498 U.S. 337, 342 (1991). Even the Fifth Circuit recognized that the "plain language of RLUIPA . . . seems to contemplate such [monetary] relief," *Sossamon,* 560 F.3d at 327, and that "RLUIPA is clear enough to create a right for damages on the cause of action analysis." *Id.* at 331. To reject that "plain language" is problematic. *See United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008) (stating that the "strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances." (internal quotation marks omitted); *Carcieri v. Salazar,* 129 S. Ct. 1058, 1066-67 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Jimenez v. Quartermen,* 129 S. Ct. 681, 685 (2009) ("It is well

established that, when the statutory language is plain, we must enforce it according to its terms.").

Additionally, the Department of Justice ("DOJ") has interpreted RLUIPA to allow for the recovery of damages. U.S. Department of Justice Civil Rights Division, *A Guide to Federal Religious Land Use Protections*, http://www.usdoj.gov/crt/religdisc/rluipa_guide.pdf (last visited August 9, 2010) ("Religious institutions and individuals whose rights under RLUIPA are violated may bring a private civil action for injunctive relief and *damages.*") (emphasis added). The DOJ's interpretation should be given considerable weight given that, in the text of RLUIPA itself, Congress provided the Attorney General express authority to "enforce compliance with this Act." 42 U.S.C. § 2000cc-2(f) (2000). When, as here, the terms of a statute contain some alleged ambiguity, this Court has determined that the statutory interpretation of the government agency authorized to enforce the statute should be given due deference. *See, e.g., I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (finding that the court of appeals should have given appropriate deference to the statutory construction of the Attorney General regarding a statute that he was charged with enforcing).

III. The Eleventh Amendment does not provide immunity for nominal damages.

Religious institutions, such as synagogues, churches, and mosques, usually represent a non-revenue producing land use. With cities and counties across the United States experiencing significant declines in revenue, many would prefer to grant a development permit to a revenue producing shopping mall than to a synagogue. Without the protections provided by Congress in RLUIPA, religious institutions have inequitable bargaining power with municipalities compared to Home Depot, the AMC movie theater, or a Hilton hotel. Commercial development represents revenue. To many bottom-line oriented governing bodies, religious institutions represent wasted space and lost revenue and jobs.

A. Nominal damages claims are essential to protect religious freedom under RLUIPA.

Assuming that the Eleventh Amendment protects states from damages under RLUIPA, the question remains whether that protection bars nominal damages. The availability of nominal damages from the State, when the State is cloaked in Eleventh Amendment immunity, is unclear. The Fifth Circuit opinion below's outright bar on damages may be read to preclude even nominal damages. Such a bar creates the undesirable consequence of allowing the State to wholly escape litigation for RLUIPA violations. The premise for awarding nominal damages is

that it makes the "deprivation of such rights actionable . . . without proof of actual injury," ensuring "that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247 (1978). The Supreme Court, however, has never directly addressed the interaction between State sovereign immunity and nominal damages and has only pronounced the general proposition that if Eleventh Amendment immunity is neither abrogated nor waived, then "a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (emphasis added); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 60 (1994) (O'Connor, J., dissenting) ("We have long held that the Eleventh Amendment bars suits against States and state entities regardless of the nature of relief requested.") (emphasis added).

Lower court decisions, in contrast to those in *Kentucky* and *Hess*, have found no abrogation or waiver of sovereign immunity, but still have permitted nominal damages; and, in RLUIPA contexts, courts have awarded nominal damages in cases in which the court found that RLUIPA's money damage claims were equally barred by both government immunity and the Prison Litigation Reform Act ("PLRA"), which bars a prisoner from bringing a federal suit for monetary damages without the showing of a physical injury. *See Mayfield v. Texas Dept. of Criminal Justice*, 529 F.3d 599, 606 (5th Cir. 2008); 42 U.S.C. § 1997(e). The Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have

held that despite the PLRA's preclusion of monetary damages, a prisoner may recover nominal damages for the vindication of a constitutional violation. *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007); *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003). It bears noting that even though the Eleventh Circuit recognized the availability of monetary damages for RLUIPA violations, the Eleventh Circuit limited State liability to only *nominal damages* based on the PLRA's directive that monetary damages not be awarded to prisoners for nonphysical injuries. *Smith*, 502 F.3d at 1271 (a *prisoner plaintiff's* right to monetary relief is severely circumscribed by the terms of the Prisoner Litigation Reform Act.").

Compelling reasons exist for this Court to make nominal damages available under RLUIPA. A plaintiff's case may be mooted by a compliant defendant if he or she does not have the option to pursue nominal damages. *See Sossamon*, 560 F.3d at 324 ("If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating . . . "); *see also Boxer X v. Donald*, 169 Fed. Appx. 555, 559 (11th Cir. 2006), *citing C & C Prods., Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). With no recovery of nominal damages possible, States wield the power to moot a claim under RLUIPA simply by voluntarily ceasing the challenged practice. Nominal damages are the symbol of scrupulous observation owed to

nondiscrimination statutes, and the Court must hold the States accountable by honoring and preserving claims for such violations. Failing to do so opens the door to the unwanted upshot of allowing a State to violate civil rights and escape legal responsibility unscathed.

B. The Fifth Circuit's opinion allows cities and counties to easily manipulate the legal system to financially eliminate religious institutions from the city or county limits.

The years of hearings leading up to passage of RLUIPA revealed that legislative action to enforce the free exercise of religion in the area of land use regulation was imperative. The record of the hearings compiled "massive evidence" that the freedom to assemble and worship is "frequently" violated by governing bodies nationwide. 146 Cong. Rec. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). This is particularly true for cases involving "new, small, or unfamiliar churches," "especially in cases of black churches and Jewish shuls and synagogues." *Id.*

For example, an Orthodox Jewish rabbi in Miami was "threatened with criminal prosecution" for leading prayers in a converted garage in a single family residential area. H.R. Rep. No. 106-219, at 10 (1999). The town of Wayne, New Jersey, "denied a permit to a black church, after one official opposed

the permit on the ground that the city would soon look like Patterson, a predominately African-American city nearby." *Id.* at 23 n.111. A Mormon congregation in Tennessee was prohibited from using as a church a former church building of another faith because the city determined that allowing it to do so was not "in the best interests" of the city. *Id.* at 22. Other churches requested permits to use a flower shop, a bank, and a theater as places of worship. In each case, the governing body responded by spot zoning each parcel of land into a "tiny manufacturing zone" in which a church was a non-permissible use. *Id.* at 21-22.

The legislative record cites to a study of religious land use regulation conducted by Brigham Young University that found "Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases." *Id.* at 20. Specifically, the study determined that "[r]eligious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches," and that these same groups accounted for "34% of the reported litigation involving accessory uses at existing churches." *Id.* at 20-21. The same study found that while "Jews account for only 2% of the population," they account for "20% of the reported locations cases and 17% of the reported accessory use cases." *Id.* at 21.

Such discrimination and disparate treatment is not limited to small churches and minority religions. The record also references a 1997 survey by the

Presbyterian Church (U.S.A.) – the largest Presbyterian body in the United States – of its 11,328 congregations. The survey focused on land use issues. Though a mainline Protestant denomination, the survey revealed at least 15% of the congregations had experienced significant conflict over a land use permit and/or an increase in the cost of their projects of more than 10% because of conditions imposed on the church by government. H.R. Rep. No. 106-219, at 21; Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 772-73 (1999). These statistics point to discriminatory actions costing untold dollars in increased costs and delays to churches simply because they are churches.

The record further reveals that discriminatory and biased actions against churches by many governing bodies are nothing short of flagrant. In Portland, Oregon, a city official ordered a Methodist church to limit attendance at its worship service to 70 persons when the church's facility could accommodate 500. 146 Cong. Rec. 14,285 (2000). Arapahoe County, Colorado, "imposed numerical limits on the number of students who could enroll in religious schools" and imposed similar restrictions "on the size of congregations of various churches" as a means to "limit[ ] their growth." *Id.* Officials in Douglas County, Colorado, actually proposed limitations on the operational hours of a church in the same way they might impose limitations on taverns. *Id.* The City of Los Angeles prohibited fifty elderly Jews from meeting for prayer in a house in the residential

neighborhood of Hancock Park. The city allowed other places for secular assemblies in the neighborhood, such as schools and recreational uses, but "refused this use because Hancock Park had no place of worship and the City did not want to create a precedent for one." H.R. Rep. No. 106-219, at 22. The City of Richmond "required places of worship wishing to feed more than thirty hungry and homeless people to apply for a conditional use permit at the cost of $1,000, plus $100 per acre of affected property." 146 Cong. Rec. 14,285 (2000). That particular ordinance "regulated only places of worship, not other institutions, and only eating by persons who are hungry and homeless." *Id.* These illustrations represent only a small fraction of the violations compiled in the legislative record. The record similarly contains dozens of additional examples of similar land use discrimination against churches and religious bodies, violations that represent the mere "tip of the iceberg." Laycock at 773.

The Fifth Circuit's restrictive reading of the relief available under RLUIPA presents a significant problem for churches and other religious organizations. As the legislative record reveals, prior to the enactment of RLUIPA, churches were the victims of increasing discrimination in the area of zoning and other land use regulation. Such free exercise violations cause extensive monetary damages and delay to churches and religious bodies. *See, e.g.*, 146 Cong. Rec. 19,125 (2000) (a Muslim mosque estimated $200,000 to cover its legal fees and relocation to another town after it

was denied use of a building); 146 Cong. Rec. 14,285–86 (2000) (a Chicago church spent $5,000 and wasted a year seeking a special use permit); H.R. Rep. No. 106-219, at 21 (a comprehensive survey of thousands of churches revealed an increase in the cost of projects by more than 10% due to conditions imposed on the churches by state and local governments).

While RLUIPA changed the law, the sentiment of these governing bodies remains the same. Religious institutions still face intentional discrimination. Such hostility to religion is more prevalent in some geographic areas than others. In the arena of land use, there are strong commercial interests at stake. Religious institutions are routinely seen as obstacles to local commercial progress, even in the most religiously tolerant cities and towns. Religious institutions, by virtue of their IRS 501(c)(3) statuses, are precluded from advocating for or against those who seek elective office. Their commercial competitors are not so restrained. The political and economic disadvantages of religious institutions further compound their inability to negotiate with city officials to the same extent as a promising commercial enterprise that produces jobs and tax revenues. Thus, the incentive of cities and counties to try to wear down a church through litigation is alluring. RLUIPA significantly reduced the incentive and provided churches the much needed bargaining equalizer to reach fair decisions regarding land use.

Even if churches may seek injunctive relief under RLUIPA against zoning or landmarking officials that would discriminate against them, under the Fifth Circuit's ruling, discriminatory government officials may now discourage religious land use with the same hostile tactics employed prior to Congress' passage of RLUIPA. Governments, by relying on a church's often humble resources, may now force a delay in a church's land use request and require the church to litigate, knowing that any damages inflicted by the delay will never be required of it. As "churches most exposed to zoning problems are young and often have little capital," Laycock at 765, such tactics are enough to chill a church's free exercise of religion and defeat the purposes of RLUIPA. *See, e.g.*, Laycock at 765 ("Litigation is expensive and uncertain at best, and in addition to the costs of litigation, the church has to commit to a lease or a mortgage to hold the property while it litigates."); Laycock at 765 n.33 (quoting *Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (oral testimony of John Mauck) ("The churches don't have the money, or the municipalities can wait them out because a church has a choice of buying a building that it can't use or having to carry that expense and pay the mortgage every month, if you can get a mortgage on a building that it can't use, or walking away.")).

A savvy city could easily deny a synagogue's permit to build for reasons that violate RLUIPA. When the synagogue sues, the city could deploy a

massive defense, draining the synagogue's limited financial resources by exposing it to protracted and sharply contested litigation. Then, when it becomes obvious that the synagogue is on the brink of victory, the city could simply approve the synagogue's permit to build, thereby mooting the request for injunctive relief. The stark facts of *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), are little comfort in the face of a city attorney proclaiming to the court that the city now "sees the light" and will abide by the law. The synagogue obtains a hollow victory, as its funds set aside to build its place of worship have been expended on the costs of experts, litigation, depositions, and attorneys – none of which are recoverable under *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598 (2001). The land will sit empty, the faithful will be without their place of worship, and the city will have prevailed in its violation of RLUIPA. Does such a scenario seem extreme? It is a scenario that represented the day to day practices of many governments before RLUIPA was enacted.

CONCLUSION

The Fifth Circuit's ruling in this case undermines the protections that Congress established not just for institutionalized persons but also for nearly every religious assembly in the United States. The Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
HIRAM S. SASSER, III
JUSTIN E. BUTTERFIELD
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
kshackelford@libertyinstitute.org

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
Petitioner,

v.

TEXAS, ET AL.,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888
johnw@rutherford.org

Mitchell A. Karlan
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

285 35

QUESTION PRESENTED

Whether an individual may sue a state or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.*

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the Institute was one of the moving forces behind the drafting and enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and has and continues to represent individuals, religious assemblies and institutions that are the intended beneficiaries of RLUIPA. The Rutherford Institute fears that the broad ruling of the United States Court of Appeals for the Fifth Circuit will undermine the salutary purposes of RLUIPA and eviscerate the protection it was meant to provide to religious liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Fifth Circuit *sua sponte* concluded that RLUIPA was not enacted pursuant to Congress's Commerce Clause or Section 5 of the Fourteenth Amendment ("Enforcement Clause")

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus curiae* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief, and copies of their letters of consent have been lodged with the Clerk of the Court.

powers. *Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009) ("RLUIPA was enacted pursuant to Congress's Spending Clause power, not pursuant to the Section 5 power of the Fourteenth Amendment"); *id.* at 328 n.34 ("[W]e agree with the Eleventh Circuit's conclusion" that "RLUIPA is Spending, not Commerce, Clause legislation[.]"). In fact, Congress expressly enacted RLUIPA pursuant to its Spending Clause, Commerce Clause, *and* Enforcement Clause powers. If the Fifth Circuit's erroneous statement concerning the constitutional powers under which RLUIPA was passed is left uncorrected, the Fifth Circuit and other lower courts will likely impose significant and unwarranted limitations in RLUIPA suits, no matter the outcome of this case.

This Court has long made clear that courts must give careful weight and consideration to Congress's purported exercise of its constitutional powers. The Fifth Circuit did not do so; it summarily rejected RLUIPA's Commerce and Enforcement Clause bases without analyzing the statutory text or legislative history that expressly invoke these sources of authority. This Court has also admonished courts not to anticipate a question of constitutional law in advance of the necessity of deciding it. Yet the Fifth Circuit did just that; the Commerce Clause and Enforcement Clause bases of RLUIPA were not on appeal to the Fifth Circuit and not necessary to the issues presented to the court.

If left uncorrected, the Fifth Circuit's summary rejection of RLUIPA's Commerce Clause and Enforcement Clause foundations threatens to severely curtail the remedies available under the Act. Money damages are properly available in RLUIPA's land use setting pursuant to the Enforcement Clause,

even in suits against states and state officials, regardless whether the entity being sued is the recipient of federal funds. Money damages are also properly available under the Commerce Clause in suits against local governments, local officials, and state officials in their individual capacities. By concluding that RLUIPA was not passed under either Congress's Commerce Clause or Enforcement Clause powers, the Fifth Circuit's decision severely curtails the availability of money damages under RLUIPA. This Court's silence on this issue risks the wholesale evisceration of this integral element of RLUIPA's enforcement mechanism, as it will likely be understood by the lower courts to be an endorsement of the Fifth Circuit's conclusion.

ARGUMENT

I. The Fifth Circuit Erred In Stating That RLUIPA Was Not Passed Under The Enforcement Clause Or The Commerce Clause.

In passing RLUIPA, Congress expressly invoked its Spending Clause, Commerce Clause, and Enforcement Clause powers. As discussed below, the Fifth Circuit erred in summarily concluding that RLUIPA was not passed under the Commerce Clause and Enforcement Clause powers by (i) neglecting to examine the statutory language or the legislative history of RLUIPA; (ii) reaching constitutional questions that were not before the court; and (iii) misconstruing this Court's discussion of RLUIPA in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

A. The Fifth Circuit Failed To Give Any Consideration To Congress's Articulated Sources of Authority For Enacting RLUIPA.

In stating that RLUIPA was not passed pursuant to Congress's Commerce Clause and Enforcement Clause powers, the Fifth Circuit ignored the plain language of RLUIPA and its legislative history. Both show that Congress expressly passed RLUIPA pursuant to its Spending Clause, Commerce Clause, *and* Enforcement Clause powers.

RLUIPA has two sections governing conduct. Section 2 (42 U.S.C. § 2000cc) protects land use applicants from religious discrimination, and Section 3 (42 U.S.C. § 2000cc-1) protects the religious exercise rights of institutionalized persons, such as those in mental hospitals and prisons. Sections 2 and 3 both apply "in any case in which (1) the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance . . .," 42 U.S.C. §§ 2000cc(a)(2)(A), 2000cc-1(b)(1), or "(2) the substantial burden affects . . . commerce with foreign nations, among the Several states, or with Indian tribes . . . ." 42 U.S.C. §§ 2000cc(a)(2)(B), 2000cc-1(b)(2). By linking RLUIPA's application to situations in which Federal funding is received or a substantial burden affects interstate commerce, Congress made clear in the text of the statute that it was passing RLUIPA pursuant to its Spending Clause and Commerce Clause powers.

The legislative history confirms that RLUIPA was passed pursuant to Congress's Commerce Clause and Enforcement Clause powers. A joint statement by the bill's sponsors states explicitly under the heading "Constitutional Authority" that sections 2

and 3 were passed under Congress's Spending Clause and Commerce Clause powers. 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (referring to these provisions as the statute's "Spending Clause provisions" and "Commerce Clause provisions").

In addition, the joint statement makes clear that "[t]he land use sections of the bill have a third constitutional base: they enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court" through Congress's Enforcement Clause powers under the Fourteenth Amendment. *Id.* The land use section thus prohibits the imposition or implementation of any land use regulation that "discriminates against any assembly or institution on the basis of religion or religious denomination" or that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b). Similarly, the land use section applies whenever "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C).

Congress also noted the bill's extensive legislative background, which was "based on three years of hearings . . . that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." 146 Cong. Rec. S7774, S7774. Within the two targeted areas—land use regulation and institutionalized persons—the bill applies "to the extent that Congress has power to regulate under the Commerce Clause, the Spending

Clause, or Section 5 of the Fourteenth Amendment." *Id.*

Against this backdrop, this Court's admonishment in *Fairbank v. United States* is particularly relevant:

> The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and *before a court is justified in holding that the legislative power has been exercised beyond the limits granted . . . the excess or conflict should be clear.*

181 U.S. 283, 285 (1901) (emphasis added). This Court has explicitly stated its reasons for instituting a presumption of constitutionality and for requiring a clear showing before a statute is declared unconstitutional. Fundamentally, this approach is necessary because, "[i]n no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power." *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 603–04 (1949). Congress's "carefully considered view" that it has properly exercised its powers "is entitled to great respect." *Id.* Thus, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President . . . it should only do so for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (*quoting Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (Stevens, J., concurring)).

In this case, the Fifth Circuit did not give the proper weight to Congress's clearly articulated bases for exercising its powers in passing RLUIPA. In-

deed, the Fifth Circuit did not consider the statutory language or the legislative history of RLUIPA at all in reaching its conclusion on this point. *See Sossamon*, 560 F.3d at 328.

B. The Fifth Circuit Erred In Addressing Constitutional Questions Which Were Not Before The Court.

The validity of the Commerce Clause and Fourteenth Amendment foundations for the statute were neither briefed to the court below nor squarely presented by the facts of this case. Fundamental principles of judicial minimalism require a court to refrain from considering a statute's constitutionality unless and until the issue is squarely and concretely presented. *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 71–72 (1961) ("No rule of practice . . . is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. S. S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). Any other approach would not be "to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923). This principle "represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." *Communist Party*, 367 U.S. at 72.

This reasoning applies equally to the premature review of portions of a statute: "Even where some of

the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality" because "'[p]assing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.'" *Id.* at 71 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). Following this conception of separation of power, it is imperative that courts leave the ultimate question of constitutionality to cases in which it is squarely raised and necessary for the result. The court below erred in failing to do so.

C. The Fifth Circuit Misconstrued This Court's Decision In *Cutter*, As Well As The Decisions Of Its Sister Circuits, In Rejecting RLUIPA's Enforcement And Commerce Clause Foundations.

Cutter v. Wilkinson is instructive in the proper way for this Court and the lower courts to address individual constitutional issues against the backdrop of a statute with multiple sections and multiple constitutional bases. 544 U.S. 709 (2005). In *Cutter*, the petitioner raised an Establishment Clause challenge to Section 3 of RLUIPA. This Court specifically declined to address the Spending Clause and Commerce Clause bases of Section 3 because these issues "were not addressed by the Court of Appeals" and "we are a court of review, not of first view . . . ." *Id.* at 718 n.7. This Court also specifically declined to address the constitutionality of Section 2, because Section 2 was "not at issue" in the case, *id.* at 715

n.3. In the decision below, however, the Fifth Circuit misconstrued *Cutter*, erroneously reading its silence regarding RLUIPA's Fourteenth Amendment basis as a tacit rejection. *Sossamon*, 560 F.3d at 328 n.31.

The lower court also stated that its rejection of RLUIPA's Commerce and Enforcement Clause bases was supported by sister circuits that chose to rely on the Spending Clause as the "most natural source of congressional authority to pass RLUIPA." *Id.* at 328 n.34. But a review of the cases cited by the Fifth Circuit does not support this interpretation of sister-circuit precedent. Rather, these cases show proper judicial restraint on the part of the circuit courts, which declined to extend their judgments beyond that which was necessary for the questions presented in each case. Because the cases could be decided on the basis of the Spending Clause alone, no other basis was reached. *See Madison v. Virginia*, 474 F.3d 118, 126 n.1 (4th Cir. 2006) ("Because we hold that the Spending Clause is a valid and sufficient source of congressional power . . . , we need not decide whether RLUIPA exceeds Congress' Commerce Clause power."); *Cutter v. Wilkinson*, 423 F.3d 579, 590 (6th Cir. 2005) (same) ; *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 n.2 (9th Cir. 2002) (same). Ironically, these sister circuits were engaging in just the kind of judicial restraint that the court below failed to employ.[2] The Fifth Circuit mis-

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[2] The Fifth Circuit further erred in its reliance, without analysis, on the opinion of the Eleventh Circuit in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007). *Sossamon*, 560 F.3d at 327–29 & n.34. Though the Eleventh Circuit comes closer to reaching the conclusion for which it is cited, the issue was not

[Footnote continued on next page]

read this judicial restraint as an "implicit conclusion of the other circuits" that *only* the Spending Clause basis was valid. 560 F.3d at 328 n.34.

The court below also failed to acknowledge that where lower courts have had occasion to face this issue directly, they have uniformly held that RLUIPA *was* validly passed under the Commerce and Enforcement Clauses. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) (Commerce Clause); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 533 (7th Cir. 2009) (same); *Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 867–68 (E.D. Pa. 2002) (same); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 995 (9th Cir. 2006) (Enforcement Clause); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240–41 (11th Cir. 2004) (same).

II. This Court Should Clarify That The Fifth Circuit Overreached In Concluding That RLUIPA Was Not Enacted Under The Enforcement Clause Or The Commerce Clause.

The fact that this Court did not explicitly state in *Cutter* that Congress passed RLUIPA under its Spending, Enforcement *and* Commerce Clause pow-

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[Footnote continued from previous page]
squarely presented there either and did not need to be decided, and the court there also did not engage in any kind of thorough statutory analysis or any discussion of the relevant Commerce Clause and Enforcement Clause cases. Yet the Eleventh Circuit too rejected out of hand these explicit bases. 502 F.3d at 1272–73, 1274 n.9.

ers, coupled with the Fifth Circuit's explicit rejection of the latter two sources of authority, will likely lead the lower courts to read any silence on the issue by this Court to be an endorsement of the Fifth Circuit's conclusion, severely curtailing the availability of money damages under RLUIPA. If RLUIPA litigants are not permitted to recover damages against states and state officials in the institutionalized persons setting, serious doubts will be raised as to whether land use litigants are also barred from recovering damages, despite the independent Enforcement Clause basis for such awards. This risk is especially great in light of the broad question on which *certiorari* was granted, which does not differentiate between different categories of RLUIPA suits. Similarly, if RLUIPA litigants may recover compensatory damages only against the recipients of federal funds, serious doubt will be raised as to whether litigants suing local governments, local government officials, and state government officials in their individual capacities are also barred from recovering damages.

But money damages were made available against each of these governmental bodies, and in each of these settings, under the clear terms of the statute. The unavailability of a damages remedy will significantly undermine RLUIPA's effectiveness as a bulwark against decisions that substantially burden the religious mission of churches and religious assemblies, and substantially burden the exercise of religion by institutionalized persons. States, cities, zoning boards, and other governmental bodies will have little incentive to comply with the statute, thus compromising the intent of the Act and threatening religious freedom. Thus, this court should expressly reject the Fifth Circuit's summary dismissal of the

Commerce and Enforcement Clauses as constitutional sources of authority for RLUIPA.

A. If Left Uncorrected, The Fifth Circuit's Erroneous Rejection Of RLUIPA's Enforcement Clause Basis Will Jeopardize Land Use Claims For Money Damages Against States and State Officials In Their Official Capacities.

In the decision below, the Fifth Circuit stated that "RLUIPA was enacted pursuant to Congress's Spending Clause power, not pursuant to the Section 5 power of the Fourteenth Amendment." 560 F.3d at 328. This pronouncement jeopardizes the award of money damages contemplated by Congress against a broad range of government entities and officials, including states and state officials in their officials capacities, in the land use setting. This risk is particularly strong in light of the fact that this Court granted *certiorari* on the broad question of whether an individual may sue "a state or state official in his official capacity for damages for violations of [RLUIPA]," which does not differentiate between the institutionalized persons and land use portions of the Act. This Court should therefore clarify that the Fifth Circuit overreached in making this unnecessary declaration of law, and that any decision denying money damages does not apply for claims brought under RLUIPA's land use provisions.

1. RLUIPA's Land Use Provisions Properly Allow Money Damages Against States And State Officials In Their Official Capacities.

It is well-established that Congress has plenary power under Section 5 of the Fourteenth Amendment

to abrogate Eleventh Amendment state sovereign immunity, provided that Congress (1) "makes its intention to abrogate unmistakably clear"; and (2) "acts pursuant to a valid exercise of its power." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("the Eleventh Amendment . . . [is] necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (abrogation under Section 5 is valid if the Act evidences an "unequivocal expression of congressional intent"). Because both conditions are met in RLUIPA's land use provision, damages are properly available against States and state officials in their official capacities.

In *Hibbs*, this Court considered whether Congress intended to abrogate state sovereign immunity under the Family and Medical Leave Act ("FMLA"). This Act allowed employees to seek damages against a "public agency," which was defined as "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." This Court found the question "not fairly debatable," and held that this language unequivocally expressed Congress's intent to abrogate Eleventh Amendment immunity. 538 U.S. at 726. Similarly, in *Kimel v. Fla. Bd. of Regents*, this Court found that identical language in the Age Discrimination in Employment Act ("ADEA") "clearly demonstrates Congress' intent to subject the States to suit for money damages . . . ." 528 U.S. 62, 73–74 (2000).

In RLUIPA, Congress showed its unmistakable intention to abrogate state sovereign immunity by using language that is highly similar to that of the

FMLA and ADEA. RLUIPA provides for suits against a "government," 42 U.S.C. § 2000cc-2(a), which is defined as, *inter alia*, "a State . . . or other governmental entity created under authority of a State" and "any branch, department, agency, instrumentality, or official of [a State]." 42 U.S.C. § 2000cc-5(4).

This Court has recognized two circumstances in which an individual may bring suit in federal court against a state: (a) waiver of sovereign immunity by the state; and (b) congressional abrogation under Section 5 of the Fourteenth Amendment. "The two distinct methods should not be confused. One requires only action by the Congress; the other requires *knowing action* by the state." *Van Wyhe v. Reisch*, 581 F.3d 639, 652 n.4 (8th Cir. 2009) (emphasis added). The lower court's discussion regarding state sovereign immunity relates only to waiver under the Spending Power; it is therefore inapposite to apply this logic to RLUIPA provisions that were passed under the Enforcement Clause. But the Fifth Circuit did just that when it recognized that "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis," but then held that it was not clear enough to "abrogate[] state sovereign immunity." *Sossamon*, 560 F.3d at 331.

This conflation of waiver and abrogation has clouded the discussion of RLUIPA and Eleventh Amendment immunity. The lower court held that the phrase "appropriate relief" is not clear enough to manifest waiver—that is, "knowing action"—by a state. But abrogation of immunity under the Enforcement Clause does not require any action by the states, only the unmistakably clear intention of Con-

gress. The plain language of this Act shows that Congress did have this intention.[3]

In addition to the statutory language of RLUIPA itself, Congress also unequivocally expressed its intent to abrogate state sovereign immunity through the Civil Rights Remedies Equalization Act of 1986 ("CRREA"), which provides for Eleventh Amendment abrogation for violations of four enumerated acts, or "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1).

The plain language of RLUIPA expressly prohibits "discriminat[ion] . . . on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). And the legislative history makes it even clearer that RLUIPA is a "Federal statute prohibiting discrimination." A joint statement by the Act's sponsoring senators noted that churches are "frequently discriminated against" by zoning authorities, which apply individualized assessments in "discriminatory ways." 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). It also notes that such discrimination is "very widespread" and is a "nationwide problem." *Id.* at 7775. *See also* H.R. Rep. No. 106-219, at 17 (1999) (RLUIPA's land use provision "specifically targets the established evidence of discriminatory land use

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[3] This is not to say that RLUIPA's "appropriate relief" language is not clear enough to effect a waiver under the Spending Clause. *See* Br. for the Pet'r 27–34. Instead, the point is simply that this Court's decision regarding waiver should not control the issue of abrogation under the Enforcement Clause.

regulations based on Congress' remedial power under Section 5 of the 14th Amendment").[4]

2. *RLUIPA's Land Use Provisions Were Validly Passed Under Section 5 of the Fourteenth Amendment.*

In order to abrogate Eleventh Amendment state sovereign immunity under Section 5 of the Fourteenth Amendment, Congress must not only "make its intention to abrogate unmistakably clear," but must also act "pursuant to a valid exercise of its power." *Hibbs*, 538 U.S. at 726. In passing RLUIPA,

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[4] While some lower courts have taken the position that CRREA only applies to RLUIPA's Section 2 (the land use provisions) and not Section 3 (the institutionalized persons provisions), *see Madison*, 474 F.3d at 132–33; *Van Wyhe*, 581 F.3d at 654–55; *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1113–14 (9th Cir. 2010), because the word "discriminate" does not appear in Section 3, there is in fact no reason to read CRREA so narrowly. *See* Br. for the Pet'r at 34–41; *Kaimowitz v. Bd. of Trs. of the Univ. of Ill.*, 951 F.2d 765, 768 (7th Cir. 1991) (finding that § 1983 is designed to prohibit discrimination, despite the absence of the word "discrimination" in the statute, and dismissing CRREA argument on alternate grounds). Because RLUIPA as a whole—and in each of its parts—prohibits discrimination, CRREA should effect an abrogation or waiver of state sovereign immunity even in the institutionalized persons setting. *See* 146 Cong. Rec. S7774, S7775 (discussing examples of religious discrimination directed towards prisoners in litigated cases); *id.* (discussing Catholic priest who was "forced to do battle over bringing a small amount of sacramental wine into prisons"); *The Need for Federal Protection of Religious Freedom After Boerne v. Flores II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for The Aleph Institute) (testimony regarding Michigan prison officials who refused to provide unleavened bread to Jewish prisoners during Passover, despite one organization's offer to donate the bread).

Congress did just that. Congress validly passes remedial legislation pursuant to the Enforcement Clause where there is "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional" and the legislation is a "congruen[t] and proportional[]" response to the constitutional violations identified by Congress. *City of Boerne v. Flores*, 521 U.S. 507, 520, 532 (1997). The massive congressional investigation that took place prior to enacting RLUIPA, coupled with the attention given to ensure that its application in the statute reflected existing Court precedent, demonstrate that both of the *Boerne* requirements are met.

Mindful that RLUIPA's statutory predecessor, RFRA, was declared unconstitutional in part because the legislative record supporting that act was inadequate, Congress conducted three years of hearings in which it heard extensive testimony from numerous witnesses and compiled "massive evidence" on the issue of religious discrimination in land use regulations. 146 Cong. Rec. S7774, S7774. RLUIPA's extensive legislative history confirms that Congress had in front of it substantial evidence of discrimination against religious groups in the application of land use statutes nationwide. The extent of this congressional examination was reflected in the sponsoring Senators' joint statement, which noted that "the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones." *Id.* at 7775.

Based on the evidence presented to it, Congress determined that discrimination against religious groups by land use authorities was a pervasive aspect of the American landscape. *See Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 860–62 (E.D. Pa. 2002) (summarizing the "massive evidence" of religious discrimination uncovered in the congressional hearings on RLUIPA); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004) (holding that "Congress's findings regarding the widespread discrimination against religious institutions are plausible and provide a basis for concluding that RLUIPA remedies and prevents discriminatory land use regulations").

As courts have uniformly recognized, "[e]ach subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability." 146 Cong. Rec. S7774, S7775–76 (citing *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) as precedential bases). *See, e.g., Freedom Baptist*, 204 F. Supp. 2d at 869 (RLUIPA "codifies the 'individual assessments' jurisprudence in the *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] through *Lukumi* line of cases."); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 352 (2d Cir. 2005) (RLUIPA's individualized assessments analysis is based on *Sherbert* and *Lukumi*); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009) (the land use section of RLUIPA "codifies *Sherbert v. Verner*"); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007) (RLUIPA codifies *Lukumi*); *see also* H.R. Rep. No. 106-219. Because RLUIPA's land

use provisions closely track the constitutional standards for free exercise, against a backdrop of "massive evidence" of religious discrimination, RLUIPA is unquestionably a "congruent and proportional response to free exercise violations." *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 994–95 (9th Cir. 2006); *see also, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240–41 (11th Cir. 2004) (same).

B. If Left Uncorrected, The Fifth Circuit's Erroneous Rejection Of RLUIPA's Commerce Clause Basis Will Jeopardize Claims For Money Damages Against Local Governments, Local Officials, And State Officials In Their Individual Capacities.

In the decision below, the Fifth Circuit agreed with the Eleventh Circuit that "RLUIPA is Spending, not Commerce, Clause legislation." 560 F.3d at 328 n.34. This pronouncement jeopardizes the award of money damages contemplated by Congress in both the land use and institutionalized persons setting against local governments, local government officials, and state government officials in their individual capacities. This Court should therefore clarify that the Fifth Circuit overreached in making this unnecessary declaration of law.

1. RLUIPA Properly Permits Money Damages Against Local Governments, Local Officials, And State Officials In Their Individual Capacities.

The Commerce Clause unquestionably permits suits for money damages against local authorities and state officials in their individual capacities, as

these categories of defendants do not enjoy state sovereign immunity. Thus, although Congress cannot abrogate the Eleventh Amendment sovereign immunity of states pursuant to its Commerce Clause power, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), "[o]nly States and state officers acting in their official capacity" enjoy such immunity. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 609 n.10 (2001). "Plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State." *Id.* This is because, "when a State creates subdivisions and imbues them with a significant measure of autonomy . . . these subdivisions are too separate from the State" to justify sovereign immunity. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990) (Brennan, J., concurring). Similarly, "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999).

RLUIPA authorizes suits against "a State, county, municipality, or other governmental entity created under the authority of the State; any branch, department, agency, instrumentality, or official of an entity . . ., and any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4). Therefore, when interstate commerce has been impacted, land use and institutionalized persons litigants may properly obtain compensatory damages for violations of RLUIPA against local governments, local government officials, and state government officials in their

official capacities, whether they receive federal moneys or not.[5]

2. *RLUIPA Was Validly Passed Under The Commerce Clause.*

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Sections 2 and 3 of RLUIPA both directly regulate interstate commerce. In their Joint Statement to the Senate during congressional hearings on the Act, Senators Hatch and Kennedy noted that the jurisdictional nexus "will most commonly be proved by showing that a burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods." 146 Cong. Rec. S7774, S7775. Zoning and land use provisions are very likely to impact the construction, purchase, and rental of buildings for religious use, and were clearly contemplated by the Senators during the passage of the Act.[6]

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[5] In addition, because the land use provisions were validly passed under the Enforcement Clause, *see supra* pp. 16–19, suits for money damages against these governmental bodies and officials are available in the land use setting regardless whether interstate commerce has been impacted.

[6] Courts regularly award money damages against local authorities in RLUIPA land use suits. *See, e.g., Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007) (remanding "to determine compensatory damages" against the city and noting that "[s]ince Lighthouse's claim for injunctive relief . . . is moot, only monetary relief is available to it"); *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 756647, at *3 (E.D. Mich. March 7, 2007) ("the Court finds that Plaintiff can pursue damages against Defendant City . . . under RLUIPA"); *Chase v. City of Ports-*

[Footnote continued on next page]

Regulations of prisoners' free exercise rights can also impact interstate commerce, for example through affecting the "interstate shipment of religious goods," *id.* , as was envisioned by the Act's sponsors. In fact, just such a situation arose in *Charles v. Verhagen*, in which prisoners challenged a variety of rules governing religious possessions by state inmates. 348 F.3d 601 (7th Cir. 2003) . The Wisconsin Department of Corrections ("DOC") admitted sending roughly 4,000 inmates out of state due to overcrowding, but applied its religious possession rules to both in-state and out-of-state inmates. Although the Seventh Circuit declined to reach the Commerce Clause issue, it noted that the facts in *Charles* "lend[] validity to RLUIPA's constitutionality under the Commerce Clause" as the "DOC certainly engages in interstate commerce to properly handle the requests for religious and other personal property from inmates housed outside Wisconsin." *Id.* at 609 n.3. This specific example underscores Congress's concern that the free exercise of religion by the institutionalized population can have an effect on interstate commerce.

Moreover, the jurisdictional nexus required by the Act ensures that only cases that impact interstate commerce will be found to have a Commerce Clause basis. This Court has made clear that Commerce Clause requirements can be satisfied by a congressional expression of jurisdictional nexus. *United*

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mouth, 428 F. Supp. 2d 487, 490 (E.D. Va. 2006) (it is "well-settled" that damages are available against a local authority under RLUIPA).

States v. Morrison, 529 U.S. 598, 612 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (stating that legislation under the commerce power should contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the [burden on religious exercise] in question affects interstate commerce."). In contradistinction to the legislation at issue in *Morrison* and *Lopez*, RLUIPA contains an express jurisdictional nexus limiting its application to cases in which "the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several States." 42 U.S.C. § 2000cc(a)(2)(B). *See* H.R. Rep. 106-219, at 16 ("[I]n line with the requirement articulated in *Lopez*, [RLUIPA] includes an express jurisdictional element, and would require a case-by-case analysis of the [e]ffect on interstate commerce."). This express jurisdictional element is sufficient to validate the invocation of congressional authority for both RLUIPA provisions under the Commerce Clause.

By providing for this nexus, Congress ensured that RLUIPA was "tautologically constitutional," in that it protects religious exercise "to the extent that the commerce power reaches" the substantial burden, but does not protect religious exercise "to the extent that [the commerce power] does not reach the burden." H.R. Rep. 106-219, at 16. Thus, Congress ensured that non-commercial effects on religious exercise are not protected under this particular clause of the statute, but rather that the commercial nexus "must be proved in each case." *Id.* at 28. As the jurisdictional nexus for Commerce Clause authority is present in both the land use and free exercise sec-

tions of RLUIPA, both provisions are equally valid exercises of Congress's commerce power.[7]

CONCLUSION

Contrary to the lower court's conclusion, RLUIPA was not enacted solely under Congress's Spending Clause power; Congress properly invoked its Enforcement and Commerce Clause powers as well. This distinction matters greatly. Under the Enforcement Clause, RLUIPA litigants in the land use setting may properly obtain money damages against states and state officials in their official capacities. Under the Commerce Clause, litigants may properly recover money damages against local governments, local government officials and individual state government actors for violations of any of RLUIPA's operative provisions. The United States Court of Appeals for the Fifth Circuit's dismissal of Congress's exercise of its powers—without rigorous analysis, in a case in which it did not need to reach the constitutional issues at all—would broadly foreclose such suits. This risk is especially great in light of the broad question on which *certiorari* was

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[7] The validity of RLUIPA's Commerce Clause foundation has been recognized by numerous courts. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) ("Consistent with *[Lopez]* precedent, we now hold that, where the relevant jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause."); *World Outreach*, 591 F.3d at 533 (RLUIPA is "based on Congress's power to regulate commerce"); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 ("[I]nsofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause.").

granted, which does not differentiate between different categories of RLUIPA suits. Though this Court need not reach the question of Enforcement and Commerce Clause validity, it should expressly reject the Fifth Circuit's dismissal of those sources of authority, lest the lower courts continue to interpret this Court's silence as acquiescence to a constricted view of RLUIPA.

Respectfully submitted.

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978 3888
johnw@rutherford.org

Mitchell A. Karlan
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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HARVEY LEROY SOSSAMON, III, *Petitioner,*

v.

TEXAS, ET AL., *Respondents,*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF CHARLES E. SISNEY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard L. Johnson
300 North Dakota Avenue
Suite 406
Sioux Falls, SD 57104
Telephone: (605) 338-2626
rljatty@aol.com

Kathryn M. Davis
Counsel of Record
Peter R. Afrasiabi
c/o CHAPMAN UNIVERSITY
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
One University Drive
Orange, CA 92866
Telephone: (714) 628-2504
Kathryn.Davis@Kmdavislaw.com

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Charles Sisney is an inmate at the South Dakota State Penitentiary, where he is confined for life, and petitioner in *Sisney v. Reisch*, No. 09-821. *Amicus* brought suit pursuant Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, challenging the prison's refusal to allow him to worship in accordance with the dictates of his Jewish faith. The district court, in a comprehensive examination of the circuit split at issue, determined that the Eleventh Amendment did not bar claims for monetary damages. The court found that Section 3 of RLUIPA is a statute prohibiting discrimination by recipients of federal funds and that the Civil Rights Remedies Equalization Act of 1986 (CRREA), 42 U.S.C. § 2000d-7, effectuates a waiver of immunity. The Eighth Circuit reversed, finding that neither RLUIPA nor CRREA effectuates a waiver of Eleventh Amendment immunity.

Amicus filed a petition for a writ of certiorari challenging the Eighth Circuit's decision, which remains pending before this Court.[2]

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[1] Pursuant to Rule 37.6, no counsel for a party has authored this brief and no person or entity, other than *amicus curiae* or his counsel, has made a monetary contribution to its preparation or submission. Letters of consent have been filed with the Clerk of Court.

[2] Respondents' cross petition in *Sisney v. Reisch*, No. 09-953 challenging the constitutionality of RLUIPA on Spending Clause grounds was opposed by *amicus* and denied. The United States intervened in the proceedings below to defend RLUIPA's constitutionality, and it, too, opposed the cross-petition.

Amicus has a strong, personal and direct interest in obtaining reversal in this case, as resolution of his claims necessarily depends on the outcome of the case at bar. Both cases raise the question whether the Eleventh Amendment bars private suits for money damages by prisoners against state prison officials for violations of Section 3 of RLUIPA.

Amicus strongly urges the Court to reverse the Fifth Circuit on the same grounds asserted in the petition for a writ of certiorari pending in *Sisney v. Reisch*—namely, that CRREA effectuates an unambiguous waiver of Eleventh Amendment immunity for violations of federal statutes prohibiting discrimination by federal funding recipients, including Section 3 of RLUIPA, which provides clear notice to the states that opt to receive federal funds that they must comply with RLUIPA's heightened protection of religious exercise and refrain, at minimum, from substantially burdensome intentional discrimination.

SUMMARY OF ARGUMENT

CRREA unambiguously effectuates waiver of Eleventh Amendment immunity for violations by states who accept federal financial assistance of certain enumerated antidiscrimination statutes, and other federal statutes prohibiting discrimination. By its terms, CRREA extends expressly and unambiguously to monetary awards. The question is whether Section 3 of RLUIPA is a statute prohibiting discrimination, such that states have clear notice that by accepting federal funds, they obligate themselves to comply with

RLUIPA's heightened substantive protections and to refrain from discriminating against religious exercise.

RLUIPA does prohibit discrimination, and states do have clear notice that federal funds cannot be used to support state-sponsored discrimination in prisons.

This Court has recognized that the term "discrimination" is to be construed expansively, and includes a range of discriminatory practices. Discrimination manifests in many forms, including not only purposeful disparate treatment based on animus, but also unjustified disparate-impact discrimination and discriminatory refusals to accommodate.

By its terms, Section 3 categorically bans *all* unjustified substantial burdens on inmates' religious exercise, whether they result from purposeful discrimination, discriminatory effects or frivolous and arbitrary refusals to accommodate. By enacting a categorical ban, which extends not only to facially discriminatory practices but also to substantial burdens imposed by facially neutral rules of general applicability, and by subjecting all such burdens to the highest judicial scrutiny, Congress made clear its intent to establish heightened protection for religious free exercise above what the Constitution requires.

It is equally clear that RLUIPA, like analogous antidiscrimination laws enacted under the Spending Clause, prohibits unjustified refusals to accommodate religious exercise, which this Court and Congress alike have recognized as a form of discrimination.

States who accept federal prison funds are undoubtedly aware that they take the assistance subject to RLUIPA's heightened substantive standards. RLUIPA's plain terms, remedial purpose and extensive history confer clear notice. This Court has recognized that RLUIPA, enacted in response to well-documented arbitrary barriers to religious freedom, accords religious exercise heightened protection from government-imposed burdens. Every circuit court that has considered the question has concluded that RLUIPA unambiguously conditions the receipt of federal funds on the states' agreement to comply with RLUIPA's heightened protection, and that states take assistance subject to those obligations.

Congress certainly has an interest in assuring its funds are not used to promote discrimination in prison, and states cannot reasonably believe otherwise.

RLUIPA need not expressly reference "discrimination" in order to unambiguously prohibit it. This Court has never held that Congress must unambiguously delineate every type of prohibited practice in order to put states on clear notice of the scope of substantive liability. Rather, the test is whether states accept federal funds with informed consent that they could be liable for violations.

Finally, this Court has recognized that *Pennhurst* does not apply to intentional violations of Spending Clause statutes that were enacted to proscribe specified conduct by federal funding recipients. Here, states have clear notice that, at minimum, intentional violations of Section 3 will subject them to liability.

ARGUMENT

I. RLUIPA Is A Statute Prohibiting Discrimination Within The Scope of CRREA, Which Provides Clear And Unambiguous Notice That States Must Comply With RLUIPA's Heightened Protection.

Modeled on analogous Spending Clause legislation aimed at eradicating discrimination in federal funding programs, RLUIPA was enacted to redress frivolous and arbitrary barriers to institutionalized persons' free religious exercise, and was expressly designed to confer heightened standards of protection even more rigorous than what the Constitution requires. By its terms, RLUIPA unambiguously and categorically prohibits *all* unjustified substantial burdens imposed on free religious exercise, whether they arise from intentional discrimination, discriminatory refusals to reasonably accommodate, or facially neutral rules of general applicability that cause discriminatory effects.

In upholding the constitutionality of RLUIPA as a valid exercise of Spending Clause power, the courts of appeals have uniformly agreed that RLUIPA provides states with unambiguous notice that the acceptance of federal funds will require them to adhere to RLUIPA's strict statutory standard and to provide the heightened substantive protection Section 3 demands. *See, e.g.*, *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009), pet. pending, No. 09-821, cert. denied, No. 09-953. Given the express clarity of RLUIPA's substantive conditions, states have clear notice that prison officials are not free to discriminate on the basis of religion.

Whether or not RLUIPA effectuates a waiver of Eleventh Amendment immunity, CRREA, by its express terms, unambiguously effectuates a waiver of immunity from suits for money damages for violations by federal funding recipients of statutes prohibiting discrimination, including Section 3 of RLUIPA.

A. CRREA Broadly Applies To Any Federal Statute Prohibiting Discrimination By Recipients Of Federal Funding Assistance.

CRREA provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a) (emphasis added).

By its terms, CRREA constitutes an unambiguous waiver of the states' Eleventh Amendment immunity against monetary awards for violations of the expressly enumerated statutes, *see e.g.*, *Lane v. Pena*, 518 U.S. 187, 200 (1996), *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring), and it broadly applies to any federal statute prohibiting discrimination by recipients of federal funds.

By its terms, CRREA is not limited to statutes that expressly prohibit intentional discrimination. While Title VI and the other enumerated statutes expressly reference discrimination, CRREA does not define that term, and nothing in the statute purports to limit the scope of proscribed conduct in the catch-all provision to any particular form of discrimination or type of discriminatory practice. And, while this Court has construed Title VI and Title IX to reach only instances of purposeful discrimination, *see Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001), it has expressly recognized that disparate impacts arising from the failure to reasonably accommodate as required by Section 504 of the Rehabilitation Act also constitute a prohibited form of discrimination. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 294-301 & n.20 (1985).

Indeed, this Court has repeatedly recognized that the term "discrimination" covers a wide range of intentional acts and is to be construed broadly—particularly, where, as in CRREA, Congress enacts a broad, general ban rather than a list of specific prohibited practices. *See Gomez-Perez v. Potter*, 553

U.S. 474, 128 S.Ct. 1931, 1939-41 (2008) (rejecting contention that omission of term "retaliation" from the general statutory ban in the Age Discrimination in Employment Act reflected Congress' intent to limit the scope of the broad antidiscrimination prohibition); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (construing blanket antidiscrimination prohibition in Title IX broadly to include retaliation and stating that "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.")

Employing this rule of broad construction, this Court has found the term discrimination covers a variety of unspecified discriminatory practices, and has found non-federal funding recipients liable for intentional violations based on unspecified acts. *See, e.g., Jackson*, 544 U.S. at 172-73 (finding implied private right of action to enforce antidiscrimination prohibition encompasses suit for damages based on retaliation); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-50 (1999) (finding student-on-student harassment is discrimination and funding recipients have adequate notice that intentional violations warrant private suits for damages); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281, 290-91 (1998) (finding deliberate indifference to sexual harassment is form of discrimination under Title IX); *Franklin*, 503 U.S. at 74-75 (finding sexual harassment is form of discrimination and is proscribed with sufficient clarity to satisfy *Pennhurst* notice requirement and support private suits for damages).

The Court has further recognized that discrimination is an expansive concept, which includes not only purposeful discrimination based on animus but also unintentional disparate impacts on protected classes and unjustified refusals to reasonably accommodate persons with disabilities. *See, e.g.*, *Olmstead v. Zimring*, 527 U.S. 581, 597-602 (1999) (holding that undue institutionalization without reasonable accommodation of persons with mental disabilities qualifies as discrimination under Title II of the American with Disabilities Act); *Choate*, 469 U.S. at 293-300 (recognizing that discriminatory animus is not necessary to establish discrimination, that Rehabilitation Act was enacted to redress discrimination resulting from "apathetic attitudes" not "affirmative animus," and assuming that it proscribes disparate impacts as well as invidious discrimination); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (noting that disparate-treatment plaintiff must establish discriminatory motive or intent but construing Title VII to include disparate-impact liability and proscribe employers' facially neutral policies that, in fact, are "discriminatory in operation").

Most notably, in *Choate*, this Court distinguished its decisions limiting the reach of Title VI and expressly rejected the contention that federal law proscribes only intentional discrimination under the Rehabilitation Act, one of the statutes enumerated in CRREA. *See Choate*, 469 U.S. at 294-95. Given the purpose of the Rehabilitation Act to eliminate barriers to public places, the deprivation of special services and discriminatory effects of facially neutral job

qualifications, the statute's objectives could not be met if a showing of discriminatory intent were required. *See id.* at 294-300. The Court thus assumed that the Rehabilitation Act would reach at least some conduct that has an unjustifiable disparate impact upon the handicapped. *See id.* at 299 & n.20 (distinguishing provisions designed to remedy past discrimination from those requiring reasonable accommodation, which "relates to the elimination of existing obstacles").

The Court has also expressly recognized that the unjustified refusal to reasonably accommodate persons with disabilities is a form of discrimination. *See Southwestern Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979) (stating that a "refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped [is] an important responsibility of HEW.") And it has expressly rejected the contention that discrimination under Title II of the ADA and the Rehabilitation Act is necessarily limited to disparate treatment of individuals on protected grounds vis-à-vis similarly situated individuals in a comparison class. *See Olmstead*, 527 U.S. at 598 & n.10 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

Congress has followed suit. Codifying this Court's construction of the term "discrimination," Congress amended Title VII, which now expressly prohibits disparate-impact discrimination without regard to

discriminatory intent. Title VII expressly defines unlawful employment practices to include disparate impacts on protected classes, which cannot be justified by business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The question is not whether the conduct was intentionally discriminatory but whether the burden is lawfully justified. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-77 (2009). Further, unjustified refusals to reasonably accommodate constitute discrimination under Title VII. 42 U.S.C. §§ 2000e-2(a), 2000e(j).

Under Title II of the ADA, discrimination is expressly defined to encompass among its forms, "outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation. . . ." 42 U.S.C. § 12101(a)(5); *see also* 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in the policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

Under the Rehabilitation Act, discrimination is undefined but its implementing regulations expressly define discrimination to include "exclusion from participation in," or "deni[al] [of] the benefits of" federally funded programs, without regard to unequal treatment or discriminatory intent. 28 C.F.R. §§ 41.51(a), (b)(1)(i), (vi), (vii), (b)(3)(ii), (b)(4)(i)-(ii). The unjustified failure to reasonably accommodate is a prohibited discriminatory practice. 28 C.F.R. § 41.53.

The principal point is that in construing the catch-all provision of CRREA and RLUIPA's broad ban on substantially burdensome practices the Court should reject overly formalistic constructions and look instead to the plain meaning of the statutes' broad prohibitions. Discrimination manifests in many forms and practices, and Congress is not required to use magic words, so long as its intent is plain. *See Gomez-Perez*, 128 S.Ct. at 1936-37 (broad antidiscrimination statute plainly prohibited but did not expressly reference retaliation); *CBOCS W., Inc. v. Humphries*, 128 S.Ct. 1951, 1960-62 (2008) (failure to explicitly reference retaliation does not reflect intent to exclude it); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding plain meaning of 42 U.S.C. § 1982 proscribed retaliation, despite absence of term "discrimination").

Equally significant, CRREA was enacted in 1986, after this Court's decisions construing the scope of antidiscrimination civil rights statutes like Title VI, Title VII and the Rehabilitation Act. *See, e.g., Choate*, 469 U.S. 287 (construing Rehabilitation Act in 1985); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) (construing Title VI); *Griggs*, 401 U.S. 424 (construing Title VII in 1971). Congress was well aware of the issues surrounding the construction and nature of the term "discrimination" when it enacted CRREA. Had Congress intended to restrict the scope of the term to intentional disparate-treatment discrimination, or to limit proscribed practices to exclude disparate-impact discrimination or discriminatory refusals to accommodate, it could have, and presumably would have, done so expressly.

B. RLUIPA Prohibits Substantially Burdensome Discrimination, Whether Based On Disparate Treatment, Disparate Impacts Or Discriminatory Refusals To Accommodate.

Section 3 of RLUIPA broadly provides:

> (a) General rule.
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, *even if the burden results from a rule of general applicability*, unless the government demonstrates that imposition of the burden on that person —
>
> (1) is in furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling interest.
>
> (b) Scope of application. This section applies in any case in which —
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1(a)-(b) (emphasis added).

While it does not expressly mention the term "discrimination," RLUIPA's broad, categorical ban unambiguously prohibits *at least* intentional discrimination, and much more—including, facially neutral but substantially burdensome rules of general applicability that result in disparate impacts on, and unjustified refusals to accommodate, institutionalized persons' religious free exercise. Patterned after analogous Spending Clause legislation like Title IX aimed at eradicating discrimination in federal funding programs, RLUIPA is expressly designed to confer heightened standards for religious free exercise.[3]

RLUIPA, by its plain terms, is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

By its terms, Section 3 categorically prohibits the imposition of *all* unjustified substantial burdens on religious free exercise, whether they result from purposeful discrimination or discriminatory effects. By enacting a categorical ban, which extends even to those substantial burdens imposed as a result of facially neutral rules of general applicability, and in restoring and extending the strict scrutiny standard to all such

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[3] *See* 42 U.S.C. § 2000cc-5(6) (defining "program or activity" to include Title VI's definition of "program or activity"); *see also Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) ("The Spending Clause provisions are modeled directly on similar provisions of other civil rights laws.").

burdens, Congress made clear its intent to establish heightened protection for religious free exercise above and beyond the existing constitutional floor.

At minimum, the Free Exercise Clause prohibits invidious religious discrimination and non-neutral facially discriminatory laws that purposefully target religious beliefs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-34 (1993) (discussing constitutional rule proscribing laws that discriminate against religious beliefs or regulate religious conduct); *Sherbert v. Verner*, 374 U.S. 398, 402-04 (1963) (stating that under the Free Exercise Clause government may not "penalize or discriminate against individuals or groups because they hold religious beliefs abhorrent to the authorities"); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (holding that prison's refusal to allow Buddhist to practice faith comparable to opportunity afforded other prisoners of conventional faith constituted "palpable discrimination").

Rules, which by object or purpose, infringe upon or restrict religious practice are neither neutral nor of generally applicability and they must be justified by "the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye*, 508 U.S. at 546; *id.* at 533-34, 542-43; *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (stating that the Free Exercise Clause "protect[s] religious observers against unequal treatment.") (Stevens, J., concurring in judgment). However, neutral laws of general applicability need not satisfy strict scrutiny, even if they burden religion. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32.

RLUIPA, like its predecessor the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, proscribes *at least* what the Constitution prohibits. Section 3 of RLUIPA provides considerably more protection for institutionalized persons' religious free exercise than does the First Amendment. *Cf. Turner v. Safley*, 482 U.S. 78, 89 (1987) (prison rules of general applicability upheld against free exercise challenge if reasonably related to legitimate penological interest).

Indeed, the very purpose of RLUIPA was to restore strict scrutiny for all substantially burdensome practices, and to require governments to satisfy strict scrutiny to justify such burdens—*regardless* of whether they result from intentional discrimination or facially neutral rules of general applicability. *See generally Cutter v. Wilkinson*, 544 U.S. 709, 714-17 (2005) (discussing purpose and history of RLUIPA and RFRA, *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-87 (1990), and *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997)); *see also* 42 U.S.C. § 2000bb(a)(2) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."); *id.* § 2000bb(b)(1) (restoring pre *Smith* compelling interest test and "to guarantee its application in all cases where free exercise of religion is substantially burdened").[4]

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[4] While no longer applicable against the states, the substantive provisions in 42 U.S.C. § 2000bb-1 mirror those in Section 3 of RLUIPA and were incorporated therein.

RLUIPA's broad substantial burden ban must be construed to proscribe both disparate-treatment and disparate-impact discrimination, in that it provides heightened protection for religious exercise and expressly prohibits unjustified substantial burdens resulting from generally applicable rules.[5] *Cf. Employment Div. v. Smith*, 494 U.S. at 885-86 & n.3. Such a broad ban, which is not limited to particular discriminatory forms or discriminatory practices, must be given a broad construction—particularly, in light of RLUIPA's well-documented history and purpose.

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[5] The courts of appeals have recognized that RLUIPA provides greater protection than the Constitution requires and that Section 2 prohibits discrimination. *See, e.g., Lovelace v. Lee*, 472 F.3d 174, 185-88, 194-95 (4th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989, 994-97 (9th Cir. 2005); *see also Truth v. Kent Sch. Dist.*, 542 F.3d 634, 646 (9th Cir. 2008) ("[W]hen Congress passed [RLUIPA], it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral nondiscriminatory policies"); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008); *cf. Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 350 (2d Cir. 2007) (observing that neutral land use regulations can impose a substantial burden where they are "arbitrarily, capriciously, or unlawfully" applied to religious institutions, which "may reflect bias or discrimination against religion"); *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 989-91 (9th Cir. 2006) (finding substantial burden under Section 2 where policies were "inconsistently applied"); *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) ("the 'substantial burden' provision [in Section 2] backstops the explicit prohibition of religious discrimination . . ., much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination;" thus unjustified burdens give rise to an inference of hostility to religion, or to a particular sect).

It is equally clear that RLUIPA, like the antidiscrimination civil rights statutes discussed above, prohibits unjustified refusals to accommodate religious free exercise, which Congress and this Court have recognized as a form of discrimination.

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter*, 544 U.S. at 714. RLUIPA protects the religious liberty of those confined to state-run institutions in which, as this Court observed: "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Id.* at 720-21 (RLUIPA "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion.").

In hearings spanning three years, Congress documented that "frivolous or arbitrary" barriers impeded the religious exercise of institutionalized persons. *Cutter*, 544 U.S. at 716 (quoting 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways")); *id.* at 716 & n.5 (reciting instances of nationwide disparate treatment by state prison officials of inmates on the basis of their religion).

Evidence before Congress demonstrated that in the absence of federal legislation, prisoners, civil detainees and individuals institutionalized in mental hospitals continued to endure substantial burdens in practicing their religious faiths, whether in the form of discriminatory refusals to accommodate religious exercise, arbitrary and frivolous obstacles imposed on the ability to worship, or outright bias and animosity. *See, e.g.*, 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000); 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000); H.R. Rep. No. 106 219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10 (summarizing testimony).

Congress heard testimony from witnesses who recounted cases in which prison officials, arbitrarily and without justification, denied prisoners access to food, clothing or religious articles that were required by the prisoners' faiths. H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10. For example, congressional testimony demonstrated that prison officials disallowed the lighting of Chanukah candles but allowed votive candles, refused to purchase or allow prisoners to receive matzo, which Jews are required to eat on Passover, and refused to let Jewish prisoners fast when their religion so required or take a sack lunch to break their fast at nightfall. *See Protecting Religious Liberty After Boerne v. Flores (Pt. III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 41, 43 (1998) (statement of Isaac Jaroslawicz, Director of Legal Affairs, Aleph Institute); *see also Cutter*, 544 U.S. at 716 n.5 (citing examples).

Congress heard testimony concerning a case in which officials allowed a prisoner to attend Episcopal services but forbade him from taking communion, (*see* 146 Cong. Rec. S7774, S7775), and a case in which prison rules "without a ghost of a reason," prevented Protestant prisoners from wearing crosses, as in *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999). *See, e.g.*, 146 Cong. Rec. S7775 (citing prison that "discriminated against Protestants" by allowing inmates to wear crosses only if attached to a rosary). Congress was particularly concerned with arbitrary and discriminatory refusals to accommodate the religious exercise of prisoners who practice certain faiths, while granting accommodations to others. RLUIPA is thus most accurately described as a civil rights statute intended to protect the religious liberty of members of minority faiths, and religious inmates.

Based on this testimony, Congress concluded that "[i]nstitutional residents' right to practice their faith is at the mercy of those running the institution." 146 Cong. Rec. S7774, S7775.

In light of these findings, and in order "[t]o secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the 'compelling governmental interest'/least restrictive means' standard." *Cutter*, 544 U.S. at 716-17. In so doing, Congress mandated a more searching standard of review for religious free exercise burdens than the Constitution itself affords. *Cf. Turner*, 482 U.S. at 89.

In light of RLUIPA's plain text, extensive history and unambiguous purpose to categorically prohibit all unjustified substantially burdensome practices, and given the broad construction this Court accords the term "discrimination," it is not reasonable to conclude that RLUIPA is anything other than a statute prohibiting discrimination against religious exercise.

It is thus not surprising that every circuit court that has considered the question has upheld the constitutionality of Section 3 of RLUIPA as a valid exercise of Congress' Spending Clause power, and several have expressly recognized that Section 3 promotes the general welfare by according heightened statutory protection for religious rights and freedoms. *See, e.g.*, *Van Wyhe*, 581 F.3d at 650; *Madison v. Virginia*, 474 F.3d 118, 123-29 (4th Cir. 2006); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1305-09 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606-11 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003); *see also Sossamon v. Texas*, 560 F.3d 316, 328-29 (5th Cir. 2009), cert. granted, No. 08-1438 (RLUIPA "was passed pursuant to the Spending Clause"); *Smith v. Allen*, 502 F.3d 1255, 1270, 1274 n.9 (11th Cir. 2007) (RLUIPA "hinges on Congress' Spending Power").

Virtually since its inception, the circuit courts have recognized that RLUIPA, like analogous Spending Clause legislation conditioning the receipt of federal funds on the states' voluntarily-assumed obligation to

refrain from discrimination, is at its core an antidiscrimination statute.

In upholding the constitutionality of Section 3 vis-à-vis the states, the Ninth Circuit observed that:

> [P]rotecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms. *See, e.g.*, Title VI, 42 U.S.C. § 2000d *et seq.* (2002); Title VII, 42 U.S.C. § 2000e *et seq.* (2002); Title IX, 20 U.S.C. § 1681 (2002).

Mayweathers, 314 F.3d at 1066-67 (emphasis in original); *see also Madison*, 474 F.3d at 128 (stating that "Congress has a legitimate interest in seeing how federal funds are spent. Congress also has a legitimate interest in protecting the religious freedoms of inmates and in not funding systems that violate them.").

The Seventh Circuit has agreed:

> RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.' . . . Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights . . . falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority.

Charles, 348 F.3d at 607 (citing *Mayweathers*); *see also Cutter*, 423 F.3d at 589 (following *Charles* and *Mayweathers* and stating that "RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion"); *Benning*, 391 F.3d at 1308-09 (discussing purpose of RLUIPA to protect religious freedom and stating that "RLUIPA . . . 'leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is eliminated.'") (citation omitted).

Just as significantly, the courts of appeals have uniformly recognized that the statutory language of RLUIPA is sufficiently clear to satisfy the second factor in *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)

—namely, that the *substantive conditions on the receipt of federal funds be set forth unambiguously.*[6]

In the Spending Clause context, Congress has "broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). While Congress cannot force the states to enact or administer a federal regulatory scheme, the Spending Clause is a "permissible method of encouraging a State to conform to federal policy choices," because "the ultimate decision" of whether to conform is retained by the states, which can always decline the federal grant. *New York v. United States*, 505 U.S. 144, 168 (1992).

When Congress attaches conditions to the states' acceptance of federal funds, the conditions must be set out "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," thus, in order for states to be bound by "federally imposed conditions," they must be accepted "voluntarily and knowingly." *Id.* States

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[6] Under *Dole*, this Court placed several restrictions upon Congress' authority to persuade via the Spending Clause: (1) the legislation must be in pursuit of the general welfare, (2) conditions on the state's receipt of federal funds must be set out *unambiguously so that participation is the result of a knowing and informed choice*, (3) conditions on federal funds must be related to the federal interest in particular national projects or programs, (4) conditions must not be prohibited by other constitutional provisions, and (5) the circumstances must not be so coercive that "pressure turns into compulsion." *Dole*, 483 U.S. at 207-11.

accept conditions knowingly and voluntarily where the "statute furnishes clear notice regarding the liability at issue." *See Arlington*, 548 U.S. at 296.

RLUIPA unambiguously conditions the receipt of federal funds on the states' knowing and informed consent to enforce RLUIPA's heightened statutory protection for inmates' religious exercise. There is no dispute among the circuit courts of appeals that the plain text of RLUIPA furnishes clear notice to the states regarding liability for infringing inmates' right to religious exercise and to be free from unjustified substantial burdens on religion as a condition of federal funds. *See, e.g.*, *Van Wyhe*, 581 F.3d at 650 ("RLUIPA . . . plainly condition[s] the state's receipt of federal funds on the requirement that the state provide RLUIPA's heightened religious protection to inmates."); *Madison*, 474 F.3d at 125; *Cutter*, 423 F.3d at 585-86; *Benning*, 391 F.3d at 1035-36; *Charles*, 348 F.3d at 607; *Maywea thers*, 314 F.3d at 1067.

Congress has the power to ensure its funds are not expended to support state-sponsored discrimination. In accepting federal financial assistance, participating states voluntarily and knowingly accept the obligation to enforce RLUIPA's substantive provisions, which, given this Court's precedents and the courts of appeals' construction, *cannot reasonably be construed to permit discrimination by recipient states.*[7] RLUIPA unambiguously constitutes clear notice under *Pennhurst* that discrimination, in any form, is barred.

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[7] Every state in the union accepts federal funding for its prisons. *See Cutter*, 544 U.S. at 716 n.4

C. Section 3 of RLUIPA Need Not Reference "Discrimination" In Order To Prohibit Discrimination Or To Constitute Clear Notice That States Are Liable For Discrimination.

Section 3 of RLUIPA need not include the term "discrimination" in order to unambiguously prohibit discrimination, and to put states on clear notice that by accepting federal funds they agree to refrain from discrimination against inmates on the basis of religion. As discussed, the absence of the term "discrimination" does not render Section 3 ambiguous, or permit a reasonable inference that states that knowingly and voluntarily accept funds can discriminate in any form.

Three circuits have concluded that Section 3 is not a "statute prohibiting discrimination" under CRREA because, unlike the other statutes enumerated in CRREA, Section 3 lacks an express textual reference to the term "discrimination" and thus it does not unambiguously prohibit discrimination. *See, e.g.*, *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1113-14 (9th Cir. 2010); *Van Wyhe*, 581 F.3d at 654-55; *Madison*, 474 F.3d at 133. The Eighth Circuit, for example, reasoned that Section 3 "does not unambiguously prohibit discrimination—it prohibits substantial burdens on religious exercise, without regard to discriminatory intent." *Van Wyhe*, 581 F.3d at 654. "Absent an unequivocal textual indication that CRREA applies to Section 3 institutionalized-person-RLUIPA claims, we will not rely on CRREA to effectuate a knowing waiver of sovereign immunity from money damages on those claims." *Id.* at 655.

But that reasoning is fundamentally flawed and contrary to the precedents of this Court.[8]

Even if the *scope of a waiver* of Eleventh Amendment immunity must extend, like a gratuitous waiver of the United States' federal sovereign immunity, unambiguously to monetary damages in the statutory text, that rule does not apply to the *scope of liability* in the Spending Clause context. Rather, the scope of liability is governed by the clear notice requirement under *Pennhurst* and *Arlington*. This Court has never held that Congress must unambiguously delineate every potential type of prohibited practice in order to put states on notice of the scope of substantive liability. Rather, the test is whether states accept federal funds with informed consent that they could be held liable for violations.

Thus, in *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484 (2009), the Court considered whether the Individuals with Disabilities Education Act (IDEA) requires school districts to reimburse the private-school tuition of a student who had been diagnosed with a learning disability. The Court found that reimbursement was authorized, despite the absence of an express textual reference to private education costs.

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[8] As an initial matter, CRREA itself could not contain an express reference to RLUIPA because it was enacted 14 years before RLUIPA was passed. And, as discussed above, the antidiscrimination statutes enumerated in CRREA are not necessarily limited to intentional discrimination, and RLUIPA, by its terms, *does* in fact cover, at least, intentional discrimination.

See id. at 2494. Because the Act was enacted pursuant to the Spending Clause, the question under *Pennhurst* was whether states had notice that they could be liable for reimbursement costs. The Court held that the Act provided unambiguous notice of the reimbursement condition because, although not expressly referenced, state funding recipients had agreed to provide a "free appropriate public education" and thus were on notice that they are responsible for reimbursement costs in the event such education was not provided. *See id.*

The Court further held that: "States have in any event been on notice at least since our decision in *Burlington* that IDEA authorizes courts to order reimbursement of costs of private special education services in appropriate circumstances. *Pennhurst's* notice requirement is thus clearly satisfied." *Id.*; *see also School Comm'n of Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359, 369 (1985) (holding that reimbursement of costs is authorized under IDEA as "appropriate" relief in light of purpose of the Act).

In contrast, in *Arlington*, 548 U.S. at 294, the Court considered whether IDEA's fee-shifting provision authorizes courts to award expert services fees, which are not expressly referenced in the text of the statute, to prevailing parents in IDEA actions. Because IDEA was enacted pursuant to the Spending Clause, the Court started with *Pennhurst* and queried whether a state official would clearly understand that in accepting federal funds one of the obligations would be to compensate prevailing parents for expert fees. *See id.* at 296.

The Court did not ask whether expert fees were unambiguously referenced in the statutory text. Rather, the Court construed the plain text of the fee-shifting provision, which expressly allowed for prevailing party attorneys' fees as part of costs, as well as other provisions of the Act, and this Court's decisions construing the term "costs." *See id.* at 295-303. The Court held that IDEA did not give states "unambiguous notice" regarding liability for expert fees as a condition of accepting federal funds. *Id.* at 300. Had the rule simply been whether IDEA contained an unequivocal textual reference to expert fees, the Court's analysis of decisional law and statutory construction would have been superfluous.

The issue in *Arlington* and *Forest Grove*, and in any Spending Clause case applying *Pennhurst*, is whether there is unambiguous *notice* to the states, not whether there is an unambiguous express *reference* in the text.

This Court's recent decision in *Gomez-Perez*, 128 S. Ct. 1931, further illustrates the point, albeit in the context of a waiver of federal sovereign immunity. There, this Court considered whether the prohibition in the Age Discrimination in Employment Act against discrimination in the federal sector based on age covered retaliation. This Court construed the plain text of the statute's broad antidiscrimination ban in light of its remedial purpose and the Court's precedents interpreting similar antidiscrimination bans in Title IX and 42 U.S.C. § 1982, and concluded that retaliation was included within the plain meaning of "discrimination based on age." *Id.* at 1936-39.

The Court reached this conclusion despite the fact that the term "retaliation" was not expressly referenced in the federal-sector provision of the Act, and despite the fact that another provision in the statute expressly prohibited retaliation in the private sector. According to the Court, the provisions were not comparable because while the private-sector provision set forth a detailed list of specifically prohibited practices, the federal-sector provisions contained a broad categorical prohibition on discrimination generally.[9] Thus, while an omission of "retaliation" from the detailed list could be interpreted as suggesting that Congress did not want to reach retaliation, the same could not be inferred from the failure to expressly reference retaliation in the federal-sector provision's broad prohibition. *See id.* at 1940-41.

More significantly, the Court expressly rejected the contention that the construction of the Act's substantive provision concerning the scope of liability was subject to the same strict rules governing the scope of waivers of federal sovereign immunity. The Court acknowledged the rule that "'[a] waiver of the Federal Government's sovereign immunity must be

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[9] This reasoning applies with equal force to RLUIPA. That Section 2 expressly references discrimination in the land use provisions does not render Section 3 ambiguous. Section 3's broad prohibition against all substantially burdensome prison regulations necessarily includes intentionally discriminatory and facially neutral practices, which result in disparate impacts or discriminatory denials of accommodation. Section 2 sets out several specific prohibited practices, including any discriminatory land use practice, even if it does not impose a substantial burden.

unequivocally expressed in statutory text' and 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Id.* at 1942-43 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). But the Court expressly held that this rule did not apply to the construction of the substantive provision outlawing discrimination. The Court held: "That the waiver [of immunity] in § 633a(c) applies to § 633a(a) [substantive] claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c)." *Id.* at 1943; *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003) (where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (quoting *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983))).

Perhaps even more significantly, and in keeping with the Court's decisions in the Spending Clause context, the Court stated that the antidiscrimination ban would cover retaliation *even if the strict rules regarding unequivocal textual waivers of sovereign immunity applied to substantive provisions*. *Id.* The Court held: "But in any event, even if § 633a(a) must be construed in the same manner as § 633a(c), we hold, for the reasons previously explained, that § 633a(a) prohibits retaliation with the requisite clarity." *Id.* Even if the "unequivocally expressed in the statutory text" rule applied, retaliation, which is not expressed, was sufficiently clear to be within the scope of liability.

This reasoning applies with equal force to RLUIPA. The waiver of the states' Eleventh Amendment immunity from private suits for monetary damages is set forth unequivocally in the statutory text of CRREA, and it expressly applies to violations of the provisions of statutes prohibiting discrimination. Section 3 of RLUIPA does not need to include an express reference to discrimination or discriminatory intent in order to find that it is a statute prohibiting discrimination, or to clearly notify states that accept federal funds that religious discrimination is barred. Even if the unequivocal expression rule does apply, for the reasons discussed above, substantially burdensome discrimination is proscribed with sufficient clarity.

Finally, regardless of whether Section 3 expressly applies to discrimination or discriminatory intent, this Court has recognized that *Pennhurst* does not apply to intentional violations of Spending Clause statutes that were enacted to proscribe specified conduct by federal funding recipients. *See, e.g., Davis*, 526 U.S. at 642 ("*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute."). This Court has observed: "*Congress surely did not intend for federal moneys to be expended to support intentional actions it sought to proscribe by statute.*" *Franklin*, 503 U.S. at 75 (emphasis added).

Here, states have clear notice that intentional violations of Section 3 will subject them to liability.

Whether driven by discriminatory intent, or something else, intentionally-imposed unjustified

substantial burdens are unambiguously proscribed by RLUIPA, and *Pennhurst* notice is necessarily satisfied.

In the case at bar, Petitioner alleged that Respondents allowed inmates on disciplinary confinement to leave their cells for secular activities, but not to attend worship services. Pet. App. 3a. In the case of *Sisney v. Reisch*, petitioner alleged that prison officials denied Jewish inmates adequate time for group worship, while Catholics, Christians and Native Americans were given more time for group services, and that petitioner was denied a request to pray in a succah booth during the Jewish festival of Sukkot, while Native Americans had regular access to a sweatlodge, which was located on the prison yard and used by hundreds of inmates. *See Sisney v. Reisch*, 533 F. Supp. 2d 952, 976-80 (D.S.D. 2008). The district court found these facts established a substantial burden on religious exercise, and a question of fact on whether that burden was justified under RLUIPA.[10]

The policies at issue in both cases plainly burdened each inmate's practice of his religion and discriminated against religious inmates in the case of *Sossamon*, and against Jewish inmates in the case of *Sisney*. It is hardly conceivable that states lack clear notice that such substantially burdensome and discriminatory actions, if unjustified by compelling government interests, would violate the plain terms of RLUIPA.

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[10] The Eighth Circuit affirmed the denial of summary judgment on the succah booth claim and reversed the group study ruling.

In sum, the absence of a textual reference to "discrimination" does not render RLUIPA ambiguous. States have notice sufficient for them to knowingly and voluntarily accept federal funds fully cognizant of the consequences of their participation—namely, that they will be subject to RLUIPA's heightened protections. Given the nature of the contractual relationship that arises between Congress and funding recipient states when Congress legislates under the Spending Clause, the plain text and purpose of RLUIPA's categorical ban on all unjustified substantial burdens, and this Court's broad construction of discrimination, RLUIPA cannot reasonably be construed to allow states to knowingly and voluntarily accept federal funds for their prisons and then use those funds to discriminate against inmates, in any form, on the basis of religion.

To suggest that RLUIPA applies to nondiscriminatory substantial burdens but offers no remedy for intentionally discriminatory burdens on religious exercise is to ignore the stated remedial purpose of RLUIPA and to defy common sense.

RLUIPA is a statute prohibiting discrimination, and CRREA unambiguously effectuates a waiver of immunity from monetary damages. At minimum, intentional violations of RLUIPA, like other antidiscrimination statutes enacted under the Spending Clause, give rise to claims for private damages.

CONCLUSION

For the reasons above, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

Richard L. Johnson
300 North Dakota Avenue
Suite 406
Sioux Falls, SD 57104
Telephone: (605) 338-2626
rljatty@aol.com

Kathryn M. Davis
Counsel of Record
Peter R. Afrasiabi
c/o CHAPMAN UNIVERSITY
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
One University Drive
Orange, CA 92866
Telephone: (714) 628-2504
Kathryn.Davis@Kmdavislaw.com